

C42Wfrel

1 UNITED STATES DISTRICT COURT  
2 SOUTHERN DISTRICT OF NEW YORK

3 FRESH DEL MONTE PRODUCE, INC.,

4 Plaintiff,

5 v.

08 CV 8718 (SHS)

6 DEL MONTE FOODS COMPANY and  
7 DEL MONTE CORPORATION,

8 Defendants.

9 New York, N.Y.  
10 April 2, 2012  
9:30 a.m.

11 Before:

12 HON. SIDNEY H. STEIN,

13 District Judge

14 APPEARANCES

15 SKADDEN, ARPS, SLATE, MEAGHER & FLOM LLP  
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(Trial resumed; jury not present)

THE COURT: Good morning. Please be seated. The jury is here. My recollection is our expert could not be here until later. So what is the plaintiff intending to put in his place?

MR. DREYER: We have the deposition read from Mr. Spielmann. We then have videotape and deposition read from Mr. Carbonell, and we had two issues, one of which affects those readings and some documents from those readings, and one of which affects, again, our damages expert's testimony that we'd like to raise with the Court this morning.

THE COURT: I'm not sure I understand. You're going to put in deposition reading?

MR. DREYER: Yes.

THE COURT: At least until your expert can get here.

MR. DREYER: Yes, your Honor. Forgive me.

THE COURT: There are questions on the depositions? I thought I handled all of those.

MR. DREYER: The only issue is for the witnesses who were shown documents we would like to put up the documents before the jury, some of them we would like to move into evidence beforehand. In discussing that process with opposing counsel, they raised the issue that it's their belief that unless a document is authenticated and there is a foundation laid for each document, it doesn't come in, and that's counter to what we had understood about the meet and confer process.

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1           If you recall, we exchanged exhibit lists back in  
2           December. Each side raised a number of objections, including  
3           foundation. We spent the past three or four months working  
4           those objections out. We have on each side probably dozens of  
5           documents that each side is not objecting to. So we don't  
6           have --

7           THE COURT: Wait. Dozens of documents in connection  
8           with these deposition readings?

9           MR. DREYER: For the case as a whole. For the  
10          deposition readings, there are five documents at issue.

11          THE COURT: All right.

12          MR. DREYER: But it also relates to a larger issue,  
13          which is that many of our exhibits we were told they were not  
14          objected to or there were objections that were withdrawn,  
15          including foundation objections.

16          THE COURT: Wait. More slowly.

17          MR. DREYER: Sure.

18          THE COURT: So if the objections were withdrawn, that  
19          is, you or somebody listed documents in the pretrial order and  
20          there either were objections or there weren't objections and if  
21          there were objections they've been withdrawn, what is the  
22          issue?

23          MR. DREYER: I have, that's my question to opposing  
24          counsel.

25          THE COURT: Let me hear from the other side.

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1 MR. GONZALEZ: Your Honor, there's one document, not a  
2 whole bunch. Just one. If you'll remember that we had an in  
3 limine motion based on a witness named Funk, and we argued that  
4 the plaintiff had not made an adequate showing that they tried  
5 to find Funk for this trial, and the Court said, Let's see what  
6 they come back with. They didn't come back with anything  
7 because I think it's pretty clear they hadn't made an effort to  
8 find Funk. That's fine.

9 So we had not objected to this one document that's at  
10 issue right now in the Carbonell reading because Funk was going  
11 to lay the foundation. However, now that your Honor has ruled  
12 and they have withdrawn Funk, there's no longer foundation for  
13 that one document, and what they want to do with Carbonell is  
14 read from that document in the Carbonell deposition.

15 THE COURT: At the Carbonell deposition, they showed  
16 him this document.

17 MR. GONZALEZ: And he said he's never seen it.

18 THE COURT: He said he never saw it and the  
19 questioning went forward?

20 MR. GONZALEZ: Correct.

21 THE COURT: Okay.

22 MR. GONZALEZ: And they read from it. That's the only  
23 objection I have.

24 THE COURT: Just a minute. He said he had never seen  
25 it, but he read from it anyway?

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1 MR. GONZALEZ: Counsel did. Counsel read to him.

2 THE COURT: And he answered questions on it and they  
3 want to put in the questions and the answers, is that correct?

4 MR. GONZALEZ: Yes. There's really just one question  
5 and one answer I'm objecting to.

6 THE COURT: Mr. Dreyer.

7 MR. DREYER: First of all, your Honor, Mr. Gonzalez  
8 has the order wrong. We withdrew Mr. Funk after they withdrew  
9 their foundation objection. We sent them an e-mail on March  
10 14, 2012.

11 THE COURT: Where was their foundation objection  
12 lodged?

13 MR. DREYER: In the exhibits to the pretrial order.  
14 It was one of the documents that we listed on the pretrial  
15 order. They lodged the foundation objection.

16 THE COURT: All right.

17 MR. DREYER: And we worked that out, and, as a result,  
18 we stopped trying to get Mr. Funk to fly all the way from  
19 Seattle to here, and what we wrote was, As you have withdrawn  
20 your objections to the documents relevant to the testimony of  
21 Daniel Funk, we are withdrawing him as a witness." This is  
22 after we had worked out the foundation issue.

23 I would also note the document is over 20 years old.  
24 So as to that document, we think they have already stipulated  
25 to its admissibility and we think it would come in under the

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1 ancient document rule.

2 THE COURT: Read me that phrase again.

3 MR. DREYER: "As you have withdrawn your objections to  
4 the documents relevant to the testimony of Daniel Funk, we are  
5 withdrawing him as a witness."

6 THE COURT: All right.

7 MR. DREYER: Then we have --

8 THE COURT: Just a moment. Step by step.

9 Mr. Gonzalez, Mr. Dreyer says you withdrew your  
10 foundation objection to the Funk document.

11 MR. GONZALEZ: Your Honor, we never made an agreement  
12 that they didn't have to bring Funk and we were going to allow  
13 this document into evidence at trial. There was no such  
14 agreement. I don't think that they can tell you in good faith  
15 that they were trying to bring Funk here live. Counsel just  
16 said, So we stopped the effort to fly him out. I don't think  
17 they've ever --

18 THE COURT: No, no. I understand your point, and we  
19 had had a discussion about the phone book, it's my  
20 recollection. But if he's writing you and saying, Since you've  
21 given up objecting to the documents, in essence, we want to put  
22 in through Carbonell in regard to Funk, we're not calling Funk  
23 because we don't need him to lay a foundation for this  
24 document.

25 MR. GONZALEZ: And, so, your Honor, what I would ask

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1 is to see whatever document Mr. Dreyer is referring to and  
2 perhaps the two of us can talk.

3 THE COURT: He's got to be referring to this document,  
4 one would think.

5 Mr. Dreyer.

6 MR. DREYER: Yes, it's Trial Exhibit 7, your Honor.

7 MR. GONZALEZ: I'm talking about the communication  
8 about the document. The one thing that didn't happen --

9 THE COURT: Show Mr. Gonzalez what you were just  
10 reading from.

11 MR. GONZALEZ: Your Honor, all I'm going to say is  
12 even reading this right now, it's very vague. It says you have  
13 withdrawn your objections to the documents relevant to the  
14 testimony of Daniel Funk. I'm not even sure what that means.

15 THE COURT: It's got to mean the documents that they  
16 wanted to put in, based on the deposition of Funk, one would  
17 think.

18 MR. GONZALEZ: Your Honor, I'll drop the issue.

19 THE COURT: All right.

20 MR. GONZALEZ: In the interest of fairness, I'll drop  
21 the issue.

22 THE COURT: And getting the jury here to hear  
23 testimony.

24 MR. GONZALEZ: We're ready to go.

25 MR. DREYER: There's the damages issue, and since it

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1 relates to a witness who may have to do some work because of  
2 the objection Del Monte Corp. has raised, I want to explain  
3 this issue to you as well.

4 THE COURT: Does this have to do with the readings?

5 MR. DREYER: It doesn't, but it relates to objections  
6 they made to our damages expert's calculation. He's one of our  
7 next witnesses, so if the objection is sustained, it may affect  
8 what he has to do between now and his testimony.

9 THE COURT: I understand.

10 MR. DREYER: As you recall, the fact cutoff was in  
11 March of 2010 in this case. Our expert report was produced in  
12 May of 2010, and his damages cutoff at the time was in January  
13 of 2010, and that was based on the financial information that  
14 Del Monte Corp. produced.

15 In preparing for trial, he made three updates to his  
16 damages calculation. The first was to cut off damages six  
17 years prior to the filing of the lawsuit that was the subject  
18 of Del Monte Corp.'s motion in limine, and they don't object to  
19 that change.

20 The second change was to take out two products from  
21 the contract damages. There was a dispute between the parties  
22 as to whether or not they contained one of the five fruits in  
23 the contract, and so we withdrew the calculations on those, and  
24 there's no objection to that.

25 The third area where there is an objection is the



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1 updated, the damages calculation for sales through May 2011,  
2 actually, May 1, 2011, and the information that he used for  
3 that was projections from a document that Del Monte Corp.  
4 produced. He stopped at May 2011 because that's where the  
5 document ends.

6 THE COURT: Was this in his report?

7 MR. DREYER: It wasn't in his report. His report was  
8 produced in May of 2010. So he was updating his damages  
9 calculation to include additional revenues and his calculation  
10 is a very straightforward one. It's a royalty-based  
11 calculation, your Honor, so it's sales times the royalty rate  
12 equals damages. So all he did to adjust for the fact that  
13 we're two years ahead of time is fold in an additional damages  
14 period through May 2011, and we produced his calculations to  
15 the other side.

16 THE COURT: When?

17 MR. DREYER: Wednesday night.

18 THE COURT: Last Wednesday night?

19 MR. DREYER: Yes, your Honor.

20 THE COURT: What is the objection?

21 MS. DeARCY: Your Honor, that is our objection. They  
22 produced this information to us last Wednesday night in the  
23 middle of trial. They never provided Del Monte with a  
24 supplement to Mr. Phillips' report. Mr. Dreyer suggests to you  
25 that they have been updating their expert report on an ongoing

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1 basis. That characterization is not quite accurate. They  
2 updated or revised the report with respect to the statute of  
3 limitations issue, your Honor, in response to your ruling with  
4 regard to our motion in limine saying that they were not  
5 entitled to seek damages outside the limitation period.

6 With respect to the fruit issue, whether or not two  
7 products, including pineapple, was an issue of debate between  
8 both damages experts throughout this litigation and indeed that  
9 issue was teed up in their reports. Unlike those two issues,  
10 your Honor, we had absolutely no notice whatsoever that they  
11 intended to use forecasted figures for the purposes of their  
12 damages, which, by the way, revises their damages upwards by  
13 millions of dollars.

14 Your Honor, they had the forecasted information which  
15 they used to supplement this report in the middle of this  
16 trial.

17 THE COURT: Wait just a moment. They have updated the  
18 expert's report on damages to account for sales of your  
19 products through May of 2011, whereas earlier it had only been  
20 through January 2010, is that right?

21 MS. DeARCY: Well, that's not exactly accurate.  
22 They're not actual sales, your Honor. These are forecasted  
23 sales.

24 THE COURT: That was what one of my questions was  
25 going to be. When did you give them that sales forecast?

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1 MS. DeARCY: They had that sales forecast when the  
2 initial damages numbers and the revenue figures were produced  
3 to them, the same numbers that their expert relied on in  
4 preparing the report.

5 THE COURT: When was that?

6 MS. DeARCY: In 2009, I believe. The report was  
7 submitted in May 2010. So they had this information for years.

8 THE COURT: All right. So your position is that it's  
9 not an update of damages for DMC's sales, but it's an update of  
10 damages for a forecast provided by DMC in 2009?

11 MS. DeARCY: Correct, your Honor.

12 THE COURT: Mr. Dreyer.

13 MR. DREYER: This is what they produced in litigation.  
14 They never updated that document. They never said here are the  
15 real sales figures. When they raised that objection on  
16 Saturday, I said, Okay, give us the sales figures, we can  
17 probably stipulate to them because again the calculation, his  
18 methodology hasn't changed. All he's doing is accounting for  
19 the interval period.

20 THE COURT: I understand.

21 MR. DREYER: They won't give us the actual sales  
22 figures, so we can't use what they produced and they went  
23 produce the numbers they say he should use, your Honor. I  
24 understand this is an area for the Court's discretion, but I  
25 think without the damages figure, if we prevail, there's

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1 basically a two-year free pass for either breach of contract.

2 THE COURT: January 2010 to the present?

3 MR. DREYER: Correct, your Honor. And we were  
4 prepared to use the forecast that went only up to May of 2011,  
5 to give them the production for a year because the production  
6 wasn't updated. If they want to give us actual numbers we were  
7 prepared to do that, but there's no question here because the  
8 calculation is two percent times whatever those numbers are.

9 THE COURT: I understand. Is the sales forecast  
10 somewhere in the record?

11 MR. FEIRMAN: I believe it is, your Honor.

12 THE COURT: Is it in your expert's report?

13 MR. DREYER: I believe it's in the expert report.  
14 It's a trial exhibit that I don't believe has been objected to.  
15 It hasn't been referred to. It hasn't been moved into evidence  
16 yet, your Honor.

17 MS. DeARCY: Your Honor --

18 THE COURT: Just a moment.

19 Yes, ma'am.

20 MS. DeARCY: The sales forecasting information for  
21 2010 and 2011 was not addressed in Mr. Phillips' report. They  
22 had the information, your Honor. They have had the ability to  
23 address the forecast information in that report, but they chose  
24 not to do so.

25 THE COURT: It sounds like they were counting on or

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1 assuming they would get the actual sales figures, is that  
2 right, Mr. Dreyer?

3 MR. DREYER: I mean, there was a duty to supplement,  
4 your Honor. We never got a Rule 26 update. If they want to do  
5 that, we can use the sales figures and the calculation can be  
6 done today.

7 MS. DeARCY: Your Honor, they never asked for the  
8 actual information. I'm not sure what the document request was  
9 in 2009, but they certainly never made a request --

10 THE COURT: No, but you are under a duty to supplement  
11 interrogatory responses.

12 MS. DeARCY: Yes, your Honor. If they weren't  
13 intending to use actual information, then they had the ability  
14 at any time in the last few years, certainly before last  
15 Wednesday, to supplement their report in a timely manner, to  
16 include forecasted information that they have had at all times.  
17 This is very prejudicial to us, your Honor. We have not had an  
18 opportunity to examine their witness.

19 THE COURT: No, it's your forecasted numbers and all  
20 he's done is apply the same royalty rate that he applied in the  
21 report.

22 MS. DeARCY: They are our forecasted numbers, your  
23 Honor, but we have not had an opportunity to examine the  
24 witness on the use of forecasted numbers in his deposition. We  
25 also have not an opportunity to talk about what the actual cost

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1 could be or would be.

2 THE COURT: The cost of?

3 MS. DeARCY: Of the product, the sale of the product.

4 THE COURT: That's even pre this forecast issue,  
5 right?

6 MS. DeARCY: That's correct, your Honor.

7 Mr. Dreyer suggested that we won't give him the actual  
8 figures.

9 THE COURT: He hasn't suggested it. He has said it.

10 MS. DeARCY: That is not true, your Honor. Mr. Dreyer  
11 knows that I worked diligently maintaining constant  
12 communication letting him know we were attempting in response  
13 to their belated supplement to their report to get the actual  
14 figures. We simply ran out of time because the plaintiffs did  
15 not give us a full opportunity to be able to respond to the  
16 supplement.

17 THE COURT: Aren't those sales figures readily  
18 available? Aren't they, in fact, one of the primary tools your  
19 business people use in terms of either claiming credit or  
20 proceeding blame for various targets.

21 MS. DeARCY: It certainly is information that our  
22 salespeople and business people regularly use. But it's not  
23 necessarily compiled in the way we need it where it's extracted  
24 out.

25 THE COURT: I understand that. When can you get that

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1 to him?

2 MS. DeARCY: We can work that out. I can talk with  
3 our client and see how quickly we can get the actual sales  
4 figures.

5 THE COURT: Weren't you asked that at some point?

6 MS. DeARCY: I did, and they're working to get it now.  
7 Unfortunately, they're in California, your Honor. I haven't  
8 had an opportunity to speak with them again.

9 THE COURT: Was this something that you were going to  
10 deal with your expert on when he takes the stand?

11 MR. DREYER: To the extent the ruling was that he  
12 could use the forecast to take the stand today, if not, I think  
13 that work can be done tonight and then we'll know when we get  
14 the actually numbers and hopefully he can take the stand  
15 tomorrow and deal with that.

16 THE COURT: Let's do it that way. I'd prefer you work  
17 on the actual sales figures. Let's have him work on the actual  
18 sales figures. It's simply a matter of updating the report.  
19 There's no change in methodology. It doesn't sound like a  
20 surprise one way or the other. I would prefer that he had  
21 actual figures. I think there is some gamesmanship going on on  
22 both sides. Have him use those sales figures. Otherwise, he  
23 can use the forecasts that DMC itself supplied.

24 Any other ruling?

25 MS. AGUIAR: So, your Honor, if there's no objection

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1 to the exhibits, we would like to move in some of which may  
2 relate to the reading we're about to do. Can I read those out?

3 THE COURT: Sure.

4 MS. AGUIAR: Yes, and there's no objection.

5 THE COURT: We're going to move in, on consent, the  
6 following exhibits.

7 MS. AGUIAR: Trial Exhibit 1, 5, 7, 68, 69, and 207.

8 THE COURT: Admitted without objection.

9 (Plaintiff's Exhibits 1, 5, 7, 68, 69, and 207  
10 received in evidence)

11 THE COURT: I had a couple of questions on the  
12 charges, but let's bring the jury in.

13 MS. AGUIAR: Just as a housekeeping matter, when the  
14 quote/unquote Mr. Spielmann takes the stand, you'll explain to  
15 the jury what's going on, or shall I do that?

16 THE COURT: But he's not taking the stand.

17 MS. AGUIAR: No, I understand that.

18 THE COURT: I will tell the jury that for scheduling  
19 of witness purposes, we're going to have a deposition reading,  
20 and I'll say they're play-acting and when the people are doing  
21 the reading, I want the reader to, these are not professionals  
22 the way the court reporters are, but I want them to be as  
23 affectless as possible; in other words, no drama. Okay?

24 (Continued on next page)  
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(In open court; jury present)

THE COURT: Please be seated.

Good morning, ladies and gentlemen. Thank you for being here. I hope you enjoyed the three days that you had. I apologize for the half hour that you were here and waiting. Some legal matters came up. I really don't like to have to have the jury sit around while these things are happening, but sometimes it just happens.

Something else happens sometimes, and that's that we have to take witnesses out of order. So we're going to interrupt the testimony of the witness who was here last week and we're going to have other witnesses now and the witness who was here last Thursday will come in later in the morning.

The other witnesses are going to be witnesses by deposition. What that means is their depositions have been taken. In other words, they gave testimony under oath in this action at a prior time. Those witnesses are not going to be here in person, so the relevant deposition portions are going to be read to you. We will have somebody who is affiliated with one law firm sitting on the witness stand, and he will act as if he is the person responding, and one of the lawyers will ask him questions. The questions are straight from the deposition transcript and the answers will be from the deposition transcript. So people on the stand here, these are not the actual witnesses, but it just is a better why to do

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"Spielmann"

1 that and to give you the testimony rather than hand you the  
2 deposition transcript. It's more realistic and makes sense.  
3 That's what we're going to do.

4 Plaintiff, call your next witness who will testify by  
5 deposition.

6 MR. KENNEDY: Yes, your Honor. Mr. Spielmann.

7 THE COURT: All right. Mr. Spielmann will testify to  
8 you by deposition.

9 RODOLFO SPIELMANN,

10 THE COURT: You may be seated, sir.

11 I'm not going to ask your name because you'll be  
12 Mr. Spielmann.

13 MS. AGUIAR: Mr. Spielmann is an employee of Del Monte  
14 Corporation.

15 THE COURT: Just so the record is correct, tell the  
16 reporter your name.

17 THE WITNESS: Jamie Stockton.

18 THE COURT: Welcome Mr. Stockton. You'll act as  
19 Mr. Spielmann. And you said Mr. Spielmann is an employee of?

20 MS. AGUIAR: Del Monte Corporation, one of the  
21 defendants.

22 THE COURT: You may ask the questions.

23 BY MS. AGUIAR:

24 "Q. And I will use FDM or Fresh Del Monte to refer to my  
25 client, Fresh Del Monte Produce. Do you understand that?

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"Spielmann"

1 "A. Perfect.

2 "Q. Okay. One last point. As I'm sure you know, we will be  
3 discussing today several products that DMC offers; in  
4 particular, the Sunfresh product line, the Orchard Select  
5 product line, the Fruit Naturals product line, the Superfruit  
6 product line, and the Fruit Bowls product line. You're  
7 familiar with all of those products?

8 "A. Yes, I am.

9 "Q. And for simplicity's sake, from time to time I may refer  
10 to those as the DMC cut-fruit products or the DMC refrigerated  
11 products. Do you understand that?

12 "A. Okay.

13 Q. With that long-winded introduction, sir, what is your  
14 title?

15 "A. Vice president of marketing for consumer growth.

16 "Q. How long have you had that position?

17 "A. Since June 2008, so it will be close to two years.

18 "Q. What are your responsibilities as the vice president of  
19 marketing for consumer growth?

20 "A. Well, I'm the head of marketing for two businesses. Our  
21 refrigerated fruit business and our college in broth business.

22 "Q. With respect to the DMC cut-fruit product, what specific  
23 responsibilities do you have?

24 "A. Overall strategy, full P & L responsibility, and all the  
25 marketing business.

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"Spielmann"

1 "Q. Could you briefly describe the work that you did while you  
2 oversaw the innovation business? What sort of things did you  
3 do?

4 "A. It's normal in innovation work. Trying to uncover  
5 consumer insights, develop concepts on the -- how we address  
6 those insights or unmet needs.

7 "Q. One of the things you mentioned was uncovering consumer  
8 insights. Could you explain what you mean by that?

9 "A. We constantly talk with consumers to try to understand  
10 what needs are not filled right now. It's a pretty broad  
11 scope.

12 "Q. You said what consumer needs are not being filled?

13 "A. Mm-hmm.

14 "Q. And does DMC use that information in any way to develop  
15 new products, the consumer insight information?

16 "A. Yes.

17 "Q. When did you start with Del Monte, by the way?

18 "A. I come from the Heinz acquisition, so I think the  
19 acquisition was December 2002.

20 "Q. Do you have a college degree?

21 "A. Yes.

22 "Q. From where?

23 "A. From Chile.

24 "Q. And what is the degree in?

25 "A. It's engineering, industrial engineering.

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"Spielmann"

1 "Q. Do you have any postgraduate degrees?

2 "A. Also from Chile, also industrial engineering.

3 "Q. What's your postgraduate degree?

4 "A. I'm a master in industrial engineering.

5 "Q. Do you know Xander Shapiro?

6 "A. Yes.

7 "Q. And so Mr. Shapiro reported to you for approximately 18  
8 months?

9 "A. Yes.

10 "Q. During that time, what were his responsibilities with the  
11 company?

12 "A. Innovation for refrigerated products.

13 "Q. Meaning what? What responsibilities did he have?

14 "A. To make it simple, he needed to come up with new products.

15 "Q. Have all of the DMC cut-fruit products been preserved in  
16 some form, to your knowledge?

17 "A. Yes.

18 "Q. They either contain preservatives or have been heat  
19 treated, correct?

20 "A. Yes.

21 "Q. Has DMC ever analyzed who its direct competitors are or  
22 more direct competitors are for the DMC cut-fruit products?

23 "A. Yes.

24 "Q. Who are they or what types of products?

25 "A. Their direct competition is Sundia, Sunkist, and Chiquita.

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"Spielmann"

1 "Q. Why those companies?

2 "A. Sundia and Sunkist offer similar products to the one we  
3 use. We have a really high level of interaction. Lower  
4 quality than ours, but similar products. Chiquita --

5 "Q. I would expect you to say nothing less.

6 "A. Chiquita mainly because their vision is similar to our  
7 vision in the segment, which is about healthy snacking. So the  
8 more we both talk about healthy snacking, the more consumers  
9 will start seeing the products comparable one to each other.

10 "Q. Does Chiquita sell any preserved refrigerated fruit  
11 products?

12 "A. Yes.

13 "Q. Which products?

14 "A. Fruit cups.

15 "Q. Do the DMC cut-fruit products also compete with fresh-cut  
16 fruit?

17 "A. If you keep opening the circles, it's farther competition.  
18 But absolutely there is some volume from one to the other.

19 "Q. Has anybody at the company ever tried to quantify the  
20 level of competition that DMC has with fresh-cut fruit?

21 "A. More than the level of competition, the level of  
22 interaction.

23 "Q. Okay. Does DMC provide any recommendations to retailers  
24 as to where the cut-fruit products should be sold --

25 "A. Yes.

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"Spielmann"

1 "Q. Within a store?

2 "A. Yes.

3 "Q. What is their recommendation?

4 "A. In the value added refrigerated produce section.

5 "Q. Has DMC conducted any adjacency studies with respect to  
6 any of the cut-fruit products?

7 "A. Yes.

8 "Q. What have they conducted?

9 "A. Bowls.

10 "Q. Okay. The fruit bowl products?

11 "A. The fruit bowl products.

12 "Q. When was that study conducted?

13 "A. It was not a study. Again. It was also a Nielsen poll.

14 "Q. Okay. If you could take a look at the document that has  
15 been marked as plaintiff's 83. Do you have an understanding as  
16 to what this document is?

17 "A. Yes, I do.

18 "Q. What is it?

19 "A. A sales presentation to the Stop & Shop customers where it  
20 covers first business performance to date and then bowls'  
21 introduction.

22 "Q. Can you turn to page DMC80017150?

23 "A. Done.

24 "Q. Do you have an understanding as to what this slide is?

25 "A. Yes.

C42Wfrel

"Spielmann"

1 "Q. What is it?

2 "A. What the salesperson recommended the buyer, where to  
3 locate the products.

4 "Q. And the salesperson is recommending that the Del Monte  
5 Corp. fruit bowl product be placed near other, or be placed  
6 near fresh-cut fruit bowls, correct?

7 "A. That's correct.

8 "Q. Do you know whether DMC has recommended to other retailers  
9 that the fruit bowl product be placed near fresh-cut fruit bowl  
10 products?

11 "A. In the very beginning when we launched this, as I  
12 mentioned before in the Nielsen study, we ended up both next to  
13 fresh-cut fruit and also within our own section. Since then,  
14 and since we realized that there is absolutely no difference  
15 between one and the other, and from a strategic perspective, we  
16 preferred to be all together. The direction has been  
17 consistent to place it together with the rest of the Del Monte  
18 items.

19 "Q. But you would agree that at least for some period DMC was  
20 recommending that the fruit bowl product be placed next to  
21 fresh-cut fruit bowls, correct?

22 "A. At the launch period, that's correct.

23 "Q. How long a period of time was that the case, that DMC was  
24 recommending that the fruit bowl product be placed next to  
25 fresh-cut fruit bowls?



C42Wfrel

"Spielmann"

1 "A. Six to nine months.

2 "Q. And what is DMC's current recommendation, just so I  
3 understand it, with respect to the fruit bowl placement?

4 "A. To be placed together with the rest of the Del Monte  
5 portfolio.

6 "Q. And just so I understand, about what time period did that  
7 recommendation change? Sometime in 2009?

8 "A. Yes. Mid-year 2009.

9 "Q. Prior to that point, do you know whether retailers were  
10 placing the Del Monte fruit bowls next to cut fresh fruit bowl  
11 products?

12 "A. Based on the sample we got from that Nielsen analysis, I  
13 would say half and half. Half of them were next to fresh-cut  
14 fruit bowls, the other half was next to the rest of our line.

15 "Q. Since the time when DMC's recommendation changed, has DMC  
16 tried to measure whether the placement in stores has also  
17 changed?

18 "A. No, we haven't.

19 "Q. Do you have any idea whether the placement in stores has  
20 changed since DMC changed its recommendation?

21 "A. I really don't know.

22 "Q. Have you been to stores where the DMC cut-fruit products  
23 are grouped all together in accordance with DMC's  
24 recommendation?

25 "A. Yes.

C42Wfrel

"Spielmann"

1 "Q. Approximately how many stores have you seen that occur?

2 "A. You're asking me to guess on that one. I really don't  
3 know.

4 "Q. If you can give me a ballpark. More than 50?

5 "A. Probably I visited 50 stores in the last year, so I would  
6 say at least 40 of them were the way we're recommending it  
7 today.

8 "Q. That is all the DMC cut-fruit products groups together?

9 "A. Yes.

10 "Q. And in those approximately 40 or so stores, how many of  
11 them also had fresh-cut fruit products in the same display  
12 container?

13 "A. Most of them.

14 "Q. Are you aware of any retailers who have, who are selling  
15 the DMC cut-fruit products in sections of the supermarket other  
16 than the refrigerated produce section?

17 "A. Not the complete lines but certain items of our line, yes.

18 "Q. Which retailers are selling certain DMC cut-fruit products  
19 in sections other than the produce section?

20 "A. Publix for Fruit Naturals, which we discussed before in  
21 the discussion, and we go man's.

22 "Q. So when we talked earlier about the analysis of the Fruit  
23 Naturals velocity in the deli versus the produce section, the  
24 data for the deli section sales for Fruit Naturals, that was  
25 from Publix?

C42Wfrel

"Spielmann"

1 "A. Yes.

2 "Q. How long has Publix been selling the Fruit Naturals  
3 products in the deli section?

4 "A. Since day one.

5 "Q. Are they sold refrigerated at Publix?

6 "A. Yes.

7 "Q. So let's just make sure this is clear. In Costco if a  
8 product has a shelf life of more than 14 days, it cannot be  
9 sold in the produce section?

10 "A. Yes.

11 "Q. Do you have an understanding as to why that's the case?

12 "A. I would love to. No.

13 "Q. So no DMC cut-fruit products are sold in the produce  
14 section at Costco, correct?

15 "A. That's correct.

16 "Q. They're sold in the dairy section or in the dairy cooler?

17 "A. That's correct.

18 "Q. How about at Sam's club, are any of the DMC cut-fruit  
19 products sold in the produce section?

20 "A. No.

21 "Q. Earlier we talked about consumer perception studies. Does  
22 DMC use consumer perception studies to help them design  
23 products?

24 "A. We use consumer research to design products, yes.

25 "Q. Do you know if the study that we just discussed on

C42Wfrel

"Spielmann"

1 Superfruit, do you know whether that was a qualitative or  
2 quantitative study?

3 "A. I don't recall.

4 "Q. Do you know what the results or conclusions of the study  
5 were?

6 "A. The new label that we designed, which has been on the  
7 market for six months right now, was better than the old one.

8 "Q. What about the new label was better than the old one?

9 "A. The communication was clearer.

10 "Q. What was changed?

11 "A. We changed -- we made it very clear with a mnemonic device  
12 of color, the fruit plus this juice. So it was very clear it  
13 was fruit plus juice versus everything combined.

14 "Q. Were there any other changes that were made to the product  
15 packaging?

16 "A. The structural packaging, we made it shorter and with a  
17 different shape than Fruit Naturals in order to differentiate.

18 "Q. Differentiate it from what?

19 "A. From Fruit Naturals.

20 "Q. Are you aware of any studies done by or for DMC in which  
21 it was concluded that products in the refrigerated section  
22 seemed fresher?

23 "A. No, I do not.

24 "Q. How large is the data source for the home scan analysis?

25 "A. I really don't know. It's large enough to get a

C42Wfrel

"Spielmann"

1 representative sample. I really don't know the number.

2 "Q. Reliable information?

3 "A. Yes.

4 "Q. How does DMC use the information it gets from Nielsen in  
5 the context of the cut fruit business? What does it do with  
6 the information?

7 "A. We try to understand how we're performing in the market,  
8 and that's pretty broad.

9 "Q. And DMC relies on the Nielsen information for that?

10 "A. Because it's factual information, yes.

11 "Q. At the time that the red grapefruit bowl was introduced,  
12 DMC was also selling some Sunfresh red grapefruit, correct?

13 "A. Yes.

14 "Q. And I believe, and you can correct me if I am wrong, the  
15 contents of the Sunfresh red grapefruit product are identical  
16 to the contents of the Fruit Bowl red grapefruit product,  
17 right?

18 "A. I believe there is a slight difference in the juice. So I  
19 believe there is a small difference, not huge. But I believe  
20 there's a small difference in the formulations.

21 "Q. What's the difference in the formulation, to your  
22 understanding?

23 "A. The amount of juice you have inside. I forget which one  
24 has more, the amount of juice. And also the ratio.

25 "Q. Go ahead. I'm sorry.

C42Wfrel

"Spielmann"

1 "A. No problem.

2 -- the ratio fruit to juice is different.

3 "Q. So how does the ratio vary from the, let's just focus on  
4 the 24 ounce Sunfresh product.

5 "A. Okay.

6 "Q. Allow does the ratio in juice from that product differ  
7 from the fruit bowl product?

8 "A. You have more fruit to juice in the glass jar than in the  
9 bowl.

10 "Q. Are you familiar with the type of packaging that other  
11 companies use for their fresh-cut fruit products?

12 "A. Yes.

13 "Q. What type of packaging is used for fresh-cut fruit  
14 products?

15 "A. Normally clear bowls with minimal labeling.

16 "Q. Do you know why DMC decided to use clear plastic packaging  
17 for the fruit bowl product?

18 MR. GONZALEZ: You just missed a couple of words.

19 MS. AGUIAR: It was on the errata. It was taken out.  
20 The witness corrected it.

21 "Q. And have you had any discussions with them on this issue,  
22 whether you offer fresh fruit or not?

23 "A. No.

24 "Q. Have any of them indicated to you that they're aware that  
25 DMC does not offer any fresh-cut fruit products?

C42Wfrel

"Spielmann"

1 "A. We have never discussed fresh-cut fruit. We have never  
2 discussed salad dressing either. I mean, we don't discuss  
3 categories we don't compete in.

4 "Q. And how does the Citrus Bowl product line help your  
5 customers enhance their fresh cut assortment?

6 "A. If they get consumers to have a destination of, say, if  
7 you want to get product, fruit, from here to the table and they  
8 want to create a destination, the ability of providing the full  
9 scope of fruit is good for them.

10 "Q. I guess what I'm focusing on is what, if anything, about  
11 this product specifically helps them enhance their fresh-cut  
12 fruit assortment?

13 "A. Going back to they don't have -- only two percent of  
14 citrus, so clearly they don't have a lot of citrus available.  
15 If the customers who are -- and this is again if, the customers  
16 want that section to be a destination for consumers to get  
17 fruit ready to go to the table, having more products, having  
18 more variety would help create the destination.

19 "Q. Do you think the Sunfresh red grapefruit product helps  
20 your customers enhance the fresh-cut fruit assortment?

21 "A. No.

22 "Q. Do you think that the Citrus Bowl product helps them  
23 enhance their fresh-cut fruit assortment?

24 "A. That was the thinking at that point in time.

25 "Q. Can you turn to page seven, please. Do you see the

C42Wfrel

"Spielmann"

1 heading risk assessment?

2 "A. Yes.

3 "Q. And am I right that one of the things that DMC worried  
4 about going wrong is that the consumer would not view the bowls  
5 as similar to fresh-cut fruit?

6 "A. Thank you. Actually, what it says here is the consumer  
7 does not view bowl as similar to fresh-cut fruit or different  
8 from Sunfresh products.

9 "Q. Right. They're two separate risks?

10 "A. Yes.

11 "Q. One risk would be that consumers saw the product as  
12 similar to the Sunfresh product, that there was no material  
13 difference?

14 "A. That's correct.

15 "Q. But another risk, you would agree, that DMC was concerned  
16 about was consumers not viewing the bowls as similar to  
17 fresh-cut fruit, right?

18 "A. I don't understand the risk. But this is what is written,  
19 yes.

20 "Q. What do you mean you don't understand the risk?

21 "A. I have no idea why that would be a risk. It's not a  
22 fresh-cut fruit item. I don't care, consumers clearly know  
23 that. I don't really care. I don't see that as a risk.

24 "Q. Okay. Well, let's talk about this test. What was the  
25 purpose of the test that is discussed in this e-mail."



C42Wfrel

"Spielmann"

1 "A. Then absolutely everything in that packaging and product  
2 tells them that this is processed, between swimming in liquid,  
3 the NLEA ingredients statement, country of origin, heavily  
4 branded, so there are a lot of pieces that tells them that this  
5 is clearly not fresh fruit.

6 MR. GONZALEZ: I'm sorry, counsel. After ingredients  
7 statement.

8 "Q. And have you had any discussions with them on this issue,  
9 whether you offer fresh fruit or not?

10 "A. No.

11 "Q. Have any of them indicated to you that they're aware that  
12 DMC does not offer any fresh-cut fruit products?

13 "A. We have never discussed fresh-cut fruit. We have never  
14 discussed salad dressing either. I mean, we don't discuss  
15 categories we don't compete in.

16 "Q. And how does the Citrus Bowl product line help your  
17 customers enhance their fresh cut assortment?

18 "A. If they get consumers to have a destination of, say, if  
19 you want to get product, fruit, from here to the table and they  
20 want to create a destination, the ability of providing the full  
21 scope of fruit is good for them.

22 "Q. I guess what I'm focusing on is what, if anything, about  
23 this product specifically helps them enhance their fresh-cut  
24 fruit assortment?

25 "A. Going back to they don't have -- only two percent of

C42Wfrel

"Spielmann"

1 citrus, so clearly they don't have a lot of citrus available.

2 If the customers who are -- and this is again if, the customers  
3 want that section to be a destination for consumers to get  
4 fruit ready to go to the table, having more products, having  
5 more variety would help create the destination.

6 "Q. Do you think the Sunfresh red grapefruit product helps  
7 your customers enhance the fresh-cut fruit assortment?

8 "A. No.

9 "Q. Do you think that the Citrus Bowl product helps them  
10 enhance their fresh-cut fruit assortment?

11 "A. That was the thinking at that point in time.

12 "Q. Can you turn to page seven, please. Do you see the  
13 heading risk assessment?

14 "A. Yes.

15 "Q. And am I right that one of the things that DMC worried  
16 about going wrong is that the consumer would not view the bowls  
17 as similar to fresh-cut fruit?

18 "A. Thank you. Actually, what it says here is the consumer  
19 does not view bowl as similar to fresh-cut fruit or different  
20 from Sunfresh products.

21 "Q. Right. They're two separate risks?

22 "A. Yes.

23 "Q. One risk would be that consumers saw the product as  
24 similar to the Sunfresh product, that there was no material  
25 difference?

C42Wfrel

"Spielmann"

1 "A. That's correct.

2 "Q. But another risk, you would agree, that DMC was concerned  
3 about was consumers not viewing the bowls as similar to  
4 fresh-cut fruit, right?

5 "A. I don't understand the risk. But this is what is written,  
6 yes.

7 "Q. What do you mean you don't understand the risk?

8 "A. I have no idea why that would be a risk. It's not a  
9 fresh-cut fruit item. I don't care, consumers clearly know  
10 that. I don't really care. I don't see that as a risk.

11 "Q. Okay. Well, let's talk about this test. What was the  
12 purpose of the test that is discussed in this e-mail?"

13 MS. AGUIAR: Trial Exhibit 58, Todd.

14 "A. To compare our product performance in consumers' eyes  
15 versus the Sundia 20 ounce item.

16 "Q. Do you know which specific Del Monte product or products  
17 were used?

18 "A. Red grapefruit bowl.

19 "Q. What about the Sundia product; is it the red grapefruit  
20 cup or tub?

21 "A. Tub.

22 "Q. You received this report, correct, from Mr. Shapiro?

23 "A. Yes.

24 "Q. Do you recall when?

25 "A. I don't, but give me a second.

C42Wfrel

"Spielmann"

1 Mid-2008, but I don't know the specific date.

2 "Q. And am I reading this right, that nearly three quarters of  
3 the consumers that were shown your red grapefruit bowl thought  
4 it looked like fresh fruit?

5 "A. What it says is 55 percent of consumers believe that the  
6 Sundia tub looked like fresh-cut fruit and 72 percent think the  
7 bowl looked like fresh fruit.

8 "Q. The bowl meaning the DMC fruit bowl?

9 "A. That's correct.

10 "Q. And you were pleased with that result, weren't you?

11 "A. I don't know. This is not my not.

12 "Q. Do you remember your reaction to this study or the results  
13 of this?

14 "A. Mainly on the three to one winner. And that was my  
15 comment before when you said have you ever done a test, I said  
16 if we have ever done one, most likely we did really well in  
17 taste. So I recall the tub one and nothing else.

18 "Q. Well, I'm focusing now not on taste but consumers'  
19 perception of whether your product looks like fresh fruit.

20 "A. And you asked my reaction to that. I don't recall that  
21 reaction because it wasn't one of my objectives.

22 "Q. Did it concern you that nearly three quarters of the  
23 consumers polled thought your product looked like fresh fruit?

24 "A. No.

25 "Q. Why not?

C42Wfrel

"Spielmann"

1 "A. Why should it.

2 "Q. Is your product fresh fruit?

3 "A. No, and it doesn't say here that it's fresh fruit. It  
4 says that it looked like. So this is not about consumers being  
5 misled. It's about consumers saying it looked like fresh  
6 fruit.

7 "Q. But it's not fresh fruit?

8 "A. It's not.

9 "Q. So it doesn't trouble you that a consumer thinks your  
10 product looks like something it's not?

11 "A. No.

12 "Q. Mr. Spielmann, I marked what appears to be your response  
13 to the e-mail we just discussed. Do you see that?

14 "A. Yes.

15 "Q. And I am right, based on your e-mail, that you were  
16 pleased with the result of the test?

17 "A. Absolutely. We're preferred three to one to Sundia.  
18 That's good.

19 "Q. Are you familiar with the Fruit Undressed ad campaign?

20 "A. Yes, I am.

21 "Q. What involvement, if any, did you have with that campaign?

22 "A. Similar to my statement before. I approved the brief. I  
23 was in the presentation. I approved the final execution.

24 "Q. When did that campaign launch?

25 "A. September, October 2008.

C42Wfrel

"Spielmann"

1 "Q. For how long did the Fruit Undressed campaign run in  
2 print?

3 "A. In print, I think the last print we had was in January  
4 2010, so if you go from September to January.

5 "Q. Could you approximate how much was spent on print  
6 advertising in connection with the Fruit Undressed ad campaign?

7 "A. Roughly \$6 million.

8 "Q. Have you seen any statistics indicating how many people  
9 were exposed to the Fruit Undressed advertising?

10 "A. Not as a total. I know that the plan in the first year  
11 was roughly an 80 percent reach, if I'm not wrong, and I forget  
12 the second year.

13 "Q. What do you mean by 80 percent reach?

14 "A. 80 percent households would see it.

15 Q. 80 percent of all households in the United States?

16 "A. Have the ability to see it. It doesn't mean that they saw  
17 it, but have the ability to see it.

18 "Q. Mr. Spielmann, have you seen this document before?

19 "A. Yes.

20 "Q. What is it?

21 "A. It's an advertising tracking. The idea was to benchmark  
22 where we were at that point before the advertising started,  
23 that's why it's October. To then be able to track afterwards  
24 if we moved the needle or not.

25 "Q. And this document says October 2008 benchmark report, but

C42Wfrel

"Spielmann"

1 then to the right it says presented by Hall & Partners for Del  
2 Monte Foods, November 24, 2008. Do you see that?

3 "A. Yes.

4 "Q. And do you recall what Hall & Partners was asked to do?

5 "A. As I mentioned before, trying to understand if advertising  
6 moved the needle. So they needed to do a benchmark before  
7 starting and then a rate afterwards to see if it moved or not.

8 "Q. I think I know what you mean, but can you explain what you  
9 mean by moved the needle?

10 "A. If it made any effect on, if it moved sales or not.

11 "Q. And what condition, if any, was reached on that issue?

12 "A. Actually, I don't recall because I, this is a benchmark,  
13 then when it came afterwards, our sales were significantly up  
14 and our household penetration was significantly up, so I didn't  
15 really care about research. I saw the end market results and  
16 that was fine.

17 "Q. So does that mean, in your view, that the advertising was  
18 effective?

19 "A. Yes.

20 "Q. Who came up with the Fruit Undressed slogan?

21 "A. Smith brothers.

22 "Q. What did DMC want to convey with that slogan?

23 "A. The same as the slogan as part of the advertising. So,  
24 again, convenient, just the fruit, great to eat, peeled so that  
25 you can eat it.

C42Wfrel

"Spielmann"

1 "Q. Doesn't that message convey that the product consists of  
2 fruit and nothing else?

3 "A. It conveys that it's just the fruit, no peeling, no  
4 pitting, no anything like that. It's just the fruit.

5 "Q. No preservatives?

6 "A. It means that it doesn't contain the pits. The definition  
7 of Fruit Undressed is we peel the fruit for you, we pit the  
8 fruit for you, we leave you only the fruit.

9 "Q. You do that with the canned fruit products too though,  
10 right?

11 "A. Yes.

12 "Q. Did you ever use the Fruit Undressed campaign for any of  
13 the canned fruit products?

14 "A. No.

15 "Q. I think we covered this before, but you would agree that  
16 the Fruit Naturals peach product that's depicted here is not a  
17 fresh product, correct?

18 "A. It's not a fresh product.

19 "Q. You would agree with me that the Sunfresh mango product  
20 depicted here is not a fresh product?

21 "A. It's not a fresh product.

22 "Q. And you would agree that the red grapefruit bowl is not a  
23 fresh product, correct?

24 "A. It is not a fresh product.

25 "Q. If you turn to page 1510 again, one to zero. This is Hall



C42Wfrel

"Spielmann"

1 & Partners' report or summary of the results of the  
2 quantitative study, correct?

3 "A. Yes.

4 "Q. At the top, Hall & Partners reports that most respondents  
5 were able to play back that the advertising was about fresh  
6 products that are healthy and ready to eat. These, of course,  
7 are not fresh products, right?

8 "A. They're not.

9 "Q. Was DMC at all concerned that most respondents who are  
10 exposed to this advertising believed that the advertising is  
11 about fresh products?

12 "A. There are a couple of things before we start. The  
13 paragraph from the top is a statement, not a fact. The facts  
14 are in the table. So now if you refer to the facts, what you  
15 have here is fresh, freshness of the product, fresh look of the  
16 product. So they lump a lot of different things together.

17 We already saw before that they probably look fresh is  
18 something that happens when you're able to see the product and  
19 you see that it's good quality. I don't know what match up  
20 each one of them was here. It wasn't relevant for me. The one  
21 that I cared about was actually the one that is two pages  
22 behind, which is when it says what is the ad's central message.

23 "Q. You're referring to page 1512?

24 "A. That's correct. And the message is the products have been  
25 peeled so I don't have to. That's close to 90 percent of

C42Wfrel

"Spielmann"

1 consumers saying that. That's our central message.

2 "Q. Do you know what the term verbatims means related in this  
3 context?

4 "A. Yes.

5 "Q. What's a verbatim?

6 "A. A verbatim is before you lump things together, the way to  
7 do this is you get a consumer phrase, a verbatim of what you  
8 can quote. And the person doing the survey, they get all these  
9 verbatims and based on their own judgment, they lump them  
10 together.

11 "Q. Did you ever see the verbatims?

12 "A. No.

13 "Q. If you looked at the verbatims, you would agree that you  
14 would be better able to tell what the individuals were saying  
15 in response to the questions, correct? That's the purpose of  
16 looking at verbatims?

17 "A. In general, yes.

18 "Q. And some of the verbatims are listed here, correct?

19 "A. 11 out of 500, yes.

20 "Q. So, for example, one of the verbatims is nothing but the  
21 fruit already peeled for your convenience, correct?

22 "A. Yes.

23 "Q. That's not a truthful statement, is it? The products  
24 contain preservatives, don't they?

25 "A. Peaches, no. For example, they don't contain

C42Wfrel

"Spielmann"

1     preservatives. You get the fruit peeled for your convenience.

2     Q. But you also get sodium benzoate and potassium sorbate with  
3     the citrus bowls, correct?

4     "A. It's correctly labeled. That's correct.

5     "Q. And you also get those ingredients with the Sunfresh  
6     manage goes, correct?

7     "A. I actually don't know. But whatever ingredients you get  
8     should be on the label.

9     "Q. The red grapefruit product contains preservatives, right?

10    "A. The red grapefruit product contains preservatives, yes.

11    "Q. The first document, No. 88, I'll represent to you is a  
12    copy of the verbatims for this advertisement. What we've done  
13    with the next exhibit I'll represent to you is we extrapolated  
14    some of the columns from the verbatims just because they were  
15    difficult to read and blow up. So I'll represent to you for  
16    the record that we extracted, not extrapolated, extracted some  
17    of the columns from the verbatims, and that's what appears in  
18    89.

19         Mr. Spielmann, I'll represent to you that the column O QAD2  
20    in 89 and AD1, at least according to the data we received,  
21    appears to be the responses recorded to the question that I  
22    read earlier; that is, what was the main message that the ad  
23    was trying to communicate? What were your impressions of Del  
24    Monte? Do you see that?

25    "A. Okay. Yes.

C42Wfrel

"Spielmann"

1 "Q. If you turn to the second page, row 121, you see the  
2 heading O QAD 2 on that and it reads, it is all natural,  
3 nothing is added to it. Do you see that?

4 "A. Yes.

5 "Q. With respect to the red grapefruit product, that's not  
6 correct, right? The red grapefruit product is not all natural?

7 "A. That's correct.

8 "Q. It contains preservatives?

9 "A. Yes.

10 "Q. If you turn to the next page, for example, respondent 164  
11 refers to the product as fresh fruit, ready to eat. Do you see  
12 that?

13 "A. Yes.

14 "Q. And, again, you would agree with me that the red  
15 grapefruit bowl is not a fresh fruit product? If you look back  
16 to the questionnaire, and No. 1 is the mango ad, ad No. 2 is  
17 the peach ad, and No. 3 is the grapefruit bowl ad.

18 "A. Thank you.

19 "Q. If you turn, for example, to line 422, the respondent 422,  
20 which is on page 10.

21 "A. Yes.

22 "Q. This respondent replied very fresh and natural, no  
23 preservatives, bursting with natural goodness. And this is in  
24 response to the mapping go product. Do you see that, ad No. 1?

25 "A. Yes, I do.

C42Wfrel

"Spielmann"

1 "Q. You would agree with me that the mango product is not a  
2 fresh product, correct?

3 "A. Correct.

4 "Q. And if, in fact, the mango product contained potassium  
5 sorbate or sodium benzoate, then this customer would be  
6 confused about the fact that the product has no preservatives,  
7 correct? You can answer the question.

8 "A. I don't know what to infer from a consumer. If the  
9 consumer would ever buy this product, he would see the label.  
10 It's correctly labeled. There are ingredients. They can make  
11 their own assessment.

12 "Q. I'm focusing on the ad, though. You would agree with  
13 me --

14 "A. If the consumer is buying the product, if you're telling  
15 me how the consumers would react to the ad, this what it says  
16 here. That one consumer out of 165 or 162 reacted to the ad  
17 this way.

18 "Q. Okay. I'm just focusing on the advertising.

19 "A. Okay.

20 "Q. Okay. Based on the advertising, right, the consumers  
21 weren't shown the product: they were shown the advertising. Is  
22 that right?

23 "A. That's correct.

24 "Q. Based on the advertising, this consumer believes that the  
25 message for the mango ad is that the product is very fresh and

C42Wfrel

"Spielmann"

1 natural, no preservatives, right?

2 "A. Yes.

3 "Q. And that's not the case, is it?

4 "A. That's correct.

5 "Q. Are you aware of any evidence that consumers were misled  
6 by any of the ads we just saw?

7 "A. No.

8 "Q. Are you aware that any consumer, of evidence that a  
9 consumer saw the Fruit Undressed ad campaign, believed that the  
10 products were fresh --

11 "A. Other than what you just told me, no, nothing.

12 Q. -- other than what we just looked at? Other than what we  
13 just looked at, are you aware of any evidence that consumers  
14 who saw the Fruit Undressed ad campaign believed the products  
15 featured in the ads were all natural?

16 "A. No."

17 MR. GONZALEZ: I'm sorry. I don't think he finished  
18 the answer.

19 MS. AGUIAR: Oh. I thought you said --

20 Sorry. We'll do it again.

21 THE COURT: Ask the question again.

22 MS. AGUIAR: Sure.

23 "Q. Are you aware that any consumer, of evidence that a  
24 consumer saw the Fruit Undressed ad campaign, believed that the  
25 products were fresh --

C42Wfrel

"Spielmann"

1 "A. Other than what you just told me, no, nothing.

2 "Q. -- other than what we just looked at? Other than what we  
3 just looked at, are you aware of any evidence that consumers  
4 who saw the Fruit Undressed ad campaign believed the products  
5 featured in the ads were all natural?

6 "A. No.

7 MS. AGUIAR: Thank you, Mr. Spielmann.

8 THE WITNESS: Thank you.

9 THE COURT: Is there a second witness by deposition.

10 MR. DREYER: There is, your Honor. Dr. Carbonell.  
11 Most of it will be by video. There's a portion we will do by  
12 read.

13 MR. GONZALEZ: Your Honor, two things of the prior  
14 reading. I'm not sure if we got the date into the record.

15 THE COURT: What was the date of the deposition?

16 MR. GONZALEZ: April 8, 2010.

17 The other thing at the outset it was represented that  
18 he was our employee. He's our former employee.

19 THE COURT: At that time.

20 MS. AGUIAR: At that time.

21 THE COURT: On the date of the deposition, was he  
22 employed by Del Monte Corporation?

23 MR. GONZALEZ: Yes. And he is not to date.

24 THE COURT: Fine.

25 MR. GONZALEZ: Thank you.

C42Wfrel

"Carbonell"

1 THE COURT: Does the jury understand that? Looks like  
2 we're now going to have a second witness, partly by video  
3 because sometimes these depositions are video'd, and partly by  
4 a reading. So you now will see the deposition by video.

5 MR. DREYER: And for the reading portion, just to move  
6 things along we can have the "witness" take the stand, if  
7 that's okay, your Honor.

8 THE COURT: All right.

9 "Q. You understand that you are under oath today, correct?

10 "A. Yes, I do.

11 "Q. And you understand that you are to give truthful answers  
12 today, is that correct?

13 "A. Yes, I do.

14 "Q. How long have you worked for Del Monte, sir?

15 "A. I was associated with Del Monte ever since the merger from  
16 NaBisCo brands with whom it was affiliated and Reynolds  
17 Industries, which owned the Del Monte Corporations businesses  
18 at the time so ever since that time, I was, which was in 1985,  
19 I became associated with the Del Monte business in various  
20 capacities.

21 "Q. How long did you continue to work for Del Monte?

22 "A. I continued to work with Del Monte Corporation after the  
23 management buyout in, I believe, 1990. And I stayed through my  
24 retirement with them in 1992, I believe.

25 "Q. At the time of the management buyout in 1989, what was



C42Wfrel

"Carbonell"

1 your title with Del Monte?

2 "A. I was chairman and chief executive officer.

3 "Q. Dr. Carbonell, in late 1988, as we discussed, KKR acquired  
4 Del Monte as part of its acquisition of RJR NaBisCo, correct?

5 "A. Yes.

6 "Q. At the time, Del Monte was wholly owned by NaBisCo,  
7 correct?

8 "A. Correct.

9 "Q. Prior to KKR's acquisition, though, didn't Del Monte  
10 operate a processed division as well as a tropical fruit  
11 division?

12 "A. Again, to be correct and helpful, if we go back to 1985  
13 when Reynolds Industries acquired NaBisCo brands, Del Monte  
14 Corporation existed pretty much as a single corporation, but it  
15 always had as a separate division what was then called Del  
16 Monte Fresh fruit, Del Monte Fresh fruit, as an, as an isolated  
17 division. Then when NaBisCo took it over, they divided the  
18 processed foods into U.S.A., international, and Canada, but  
19 kept fresh as a single entity, as it pretty much was. When I  
20 took it over as CEO of Del Monte Corp., my assignment, my first  
21 assignment was to reconstitute all of the business back  
22 together of process, which I did. And so, I had processed as a  
23 totally perfect, the consolidated company and fresh. The two  
24 were never broken apart or commingled, sir. That was always  
25 kept fresh as a separate unit.

C42Wfrel

"Carbonell"

1 "Q. Why was fresh kept as a separate unit, if you recall?

2 "A. This is an entirely different business, that process is.

3 Fresh is a growing of an imported business. Heavy component in

4 agriculture. Even heavier component in shipping, and also in

5 taxation because of offshore locations and offshore marks.

6 And, therefore, there was no benefit to integration.

7 Therefore, there was no benefit to integration."

8 (Continued on next page)

C42FFRE2

"Carbonell"

1 "Q. Did the two businesses source different types of fruit  
2 from each other at that time?

3 "A. There were some areas where I think pineapple was a common  
4 denominator.

5 "Q. Meaning both businesses sold pineapple? I'm trying to  
6 understand what you mean when you say common denominator.

7 "A. Let me explain, please. The business of Fresh were -- was  
8 primarily bananas, fresh bananas and there was no commingling  
9 at all. That was entirely unutilized by Del Monte process. I  
10 don't recall this maybe some fruit cocktails might have had  
11 some banana component, but that was a minor deal.

12 "Q. Other than possibly bananas do you recall any other  
13 specific fruits or vegetables that were sold only by what  
14 you're calling the Fresh business?

15 "A. Yes.

16 "Q. What products?

17 "A. Products like mangos, berries, except for fruit cocktail,  
18 you know, components.

19 "Q. Did Fresh sell berries as part of the fruit cocktail?

20 "A. Under the Del Monte brand?

21 "Q. Yes.

22 "A. I don't recall Fresh selling a Del Monte branded fruit  
23 cocktail.

24 "Q. Did they sell any fruit cocktail under any other brand?

25 "A. There's an affiliation and an acquisition with a company

C42FFRE2

"Carbonell"

1 by the name J. Nichols that had a -- the name Sun something, I  
2 don't recall. That was a chemically treated fruit cocktail.

3 "Q. And was that sold as part of the Fresh operations?

4 "A. That was part of the Fresh operations to use surplus  
5 fruit.

6 "Q. And that was a preserved product?

7 "A. To the best of my recollection, it was.

8 "Q. Do you recall what fruits, what parts, what fruits were  
9 part of that fruit cocktail?

10 "A. I remember pineapple, I remember papaya and I remember  
11 berries. But other than that, I don't -- I don't think were  
12 more.

13 "Q. Just so we're clear, during this time period did the  
14 process business sell any melon products, do you recall?

15 "A. Melons?

16 "Q. Melons.

17 "A. No, I don't recall.

18 "Q. Do you recall whether the Fresh business sold melons  
19 during this time period?

20 "A. Again, part of the J. Nichols acquisition brought a melon  
21 business in the U.S., I think a trucking business, that J.  
22 Nichols was doing at the time.

23 "Q. Dr. Carbonell, earlier we were talking about the J.  
24 Nichols business. Do you recall specifically what line of  
25 business J. Nichols was in when it was acquired by Del Monte?

C42FFRE2

"Carbonell"

1 "A. I know that an important part of the acquisition was that  
2 J. Nichols' operation in Costa Rica, which I visited  
3 personally, J. Nichols had in Costa Rica a packing plant for  
4 refrigerated chemically processed fruit salads and might have  
5 also had other products to export, but I don't recall that they  
6 were prominent or of interest to us. And then in the United  
7 States, as I mentioned, I recall his having a melon, a  
8 watermelon trucking business, and that was of interest to us in  
9 the sense of expanding the number of fresh fruits that Del  
10 Monte Tropical would market. And that's all I recall, sir.

11 "Q. The refrigerated fruit salad that you talked about, I know  
12 we talked about this a little bit earlier, do you recall  
13 specifically what fruits are contained within the J. Nichols  
14 fruit salad?

15 "A. As I believe I said, they were, besides pineapple, they  
16 had berries, they had papaya and they may have melons like  
17 cantaloupe and the like.

18 "Q. And when those products were sold to consumers were they  
19 sold in --

20 "A. As fresh fruit.

21 "Q. Were they sold in a refrigerated container?

22 "A. Yes, I believe so.

23 "Q. And you said that they were treated with chemicals, is  
24 that right?

25 "A. I believe they had sodium benzoate, yes.

C42FFRE2

"Carbonell"

1 "Q. Do you know whether they also had potassium sorbate?

2 "A. Yes, they might have that also, but I am not a hundred  
3 percent sure which antimycotic mixture they used, why they  
4 relied on benzoate, which is the cheaper way of doing it or  
5 whether they also used sorbate. I don't know.

6 "Q. Do you recall whether the product used ascorbic acid?

7 "A. Ascorbic acid is used to preserve color normally. It's an  
8 antioxidant. And they might have, but I don't know for a fact.

9 "Q. Let me see if I can refresh your recollection. If you  
10 could turn to Exhibit 42, which is your trial testimony,  
11 correct? Starting on page 61. Then there is another question  
12 that's asking about that operation and you describe it starting  
13 at 62 as: 'Very similar to what I described for Hawaii. In  
14 addition, in Costa Rica, we owned a subsidiary at the time by  
15 the name of J. Nichols Company, which was in the business of  
16 growing melons and other fruits, berries, and they had a fruit  
17 salad operation which was preserved fruit salad, through what I  
18 would call antimycotics, which comprises everything you  
19 mentioned earlier, benzoate, sorbate, ascorbic acid and they  
20 made small fruit salad exports that were not under the Del  
21 Monte label.' Do you see that?

22 "A. I see that.

23 "Q. Does that refresh your recollection as to whether the J.  
24 Nichols products contained --

25 "A. That's shows I had a better memory ten years ago than I do

C42FFRE2

"Carbonell"

1 knew.

2 "Q. I'm sure we all did, sir. And you believe that to be  
3 accurate, is that correct?

4 "A. I believe so, yes.

5 "Q. I'm going to go to the second document, which is DMFP1576.  
6 We talked about this earlier. This is under the heading Del  
7 Monte fresh fruit operations.

8 "A. 526?

9 "Q. 1576.

10 "A. 1576. Yes, sir.

11 "Q. This was the J. Nichols fruit salad that we talked about  
12 earlier under the heading Tropical Sun products. And it says,  
13 'Current production plans include the development of a fruit  
14 salad to be packed in one gallon and quart plastic jars,  
15 refrigerated, shipped and sold to the U.S. food service  
16 industry and retail chain stores through J. Nichols.' Do you  
17 see that?

18 "A. Yes, sir.

19 "Q. Does that refresh your recollection as to whether the J.  
20 Nichols products were to be sold in a refrigerated form?

21 "A. It would appear to indicate that they were selling  
22 refrigerated products, yes, sir.

23 "Q. Let's mark the next exhibit. Dr. Carbonell, focusing on  
24 what I think is the first page of what you have with the number  
25 on the bottom, DMFP1259, do you see that document?

C42FFRE2

"Carbonell"

1 "A. Yes. I believe this is the offering document that Goldman  
2 Sachs prepared when the entire Del Monte Foods was for sale.

3 "Q. And what was the purpose of this document, if you recall?

4 "A. The purpose of this document was to introduce the asset  
5 that we were trying to sell to potential buyers. We mailed  
6 these to a number of companies on a worldwide basis and invited  
7 them to participate in a closed auction bidding process for the  
8 entire business, and this was how we introduced ourselves. We  
9 not only had sent the document to the companies, but those who  
10 attended, we had a number of shows, if you like, where we made  
11 a presentation of these materials and answered any questions  
12 they had. And we hopefully enticed them into participating in  
13 the bidding process.

14 "Q. And ultimately to buy the company?

15 "A. Ultimately succeeded in the divestiture of the asset, if  
16 you would, the brokered business.

17 "Q. If you could then go to the beginning of the next part of  
18 the document, which is marked DMPF1530?

19 "A. With the separate bundle?

20 "Q. Yes, sir.

21 "A. Yes.

22 "Q. Which also has the heading Del Monte fresh fruit  
23 operations?

24 "A. Correct.

25 "Q. Have you seen this document before?



C42FFRE2

"Carbonell"

1 "A. Yes, sir.

2 "Q. If you could turn to page DMFP1576?

3 "A. 12576?

4 "Q. Yes, sir.

5 "A. Yes, sir.

6 "Q. Under the heading Tropical Sun Products SA, do you see  
7 that?

8 "A. Mm-hmm.

9 "Q. And it reads 'In August 1998 DMTFC,' and DMTFC is a  
10 reference to Del Monte Tropical Fruit company?

11 "A. Mm-hmm. Yes.

12 "Q. 'DMTFC acquired a 50 percent interest in a tropical fruit  
13 salad operation in Costa Rica.' Do you see that?

14 "A. Yes.

15 "Q. Is that a reference to J. Nichols, if you recall?

16 "A. I believe it is, yes.

17 "Q. It says, 'The acquisition was made primarily to facilitate  
18 the production of tropical fruit salad from residual fruit  
19 generated from the division's growing operation in Costa Rica.  
20 This includes pineapple from Pindeco and melons from J.  
21 Nichols' Inc. contract office.' Do you see that?

22 "A. Yes, sir.

23 "Q. It continues: 'The current production plants include the  
24 development of a fruit salad to be packed in one gallon and  
25 quart plastic jars, refrigerated, shipped and sold to the U.S.

C42FFRE2

"Carbonell"

1 food service industry to retail chain food stores through J.  
2 Nichols.' Do you see that?

3 "A. I do.

4 "Q. Is this a reference to the chemically treated fruit salad  
5 product that we talked about a moment ago, do you recall?

6 "A. I believe so, yes.

7 "Q. Sir, based on this document, is it fair to say that  
8 pineapples and melons were an important part of the Del Monte  
9 tropical fruit business as of 1989?

10 "A. I don't agree with that. I don't think so. They were a  
11 minor part.

12 "Q. But they were referenced in this document as a new product  
13 that was going to be part of the tropical fruit business,  
14 correct?

15 "A. Yes, but it doesn't say that it's going to become a  
16 significant part of it.

17 "Q. Was it an important part of that business?

18 "A. Melons.

19 "Q. And pineapple -- yes, melons?

20 "A. Pineapple for sure. Melons, no.

21 "Q. How about the fruit salad product?

22 "A. As I think it says, I think they used the word 'residual.'  
23 It was an outlet for residual fruit.

24 "Q. And it was significant enough that it was included in  
25 Goldman Sachs' analysis of the company that was designed to

C42FFRE2

"Carbonell"

1 attract potential buyers, correct?

2 "A. I don't think it is an assessment of significance in the  
3 presentation. It doesn't say it's anticipated to be a major  
4 component of revenues or earnings. I think it's just listed  
5 among new product activity, which was an important thing to  
6 catch the eye of the potential buyers.

7 "Q. Okay. I understand.

8 "A. Del Monte classic had the same thing and it was far more  
9 important to Del Monte process than J. Nichols' products were  
10 to Del Monte tropical.

11 "Q. Let's mark the next document. Just so we're clear, this  
12 is a document that bears the Bates range DMFP5520 through 5525  
13 and it's a September 12, 1988 memo from D. Funk and A. Schurr.  
14 Have you seen this memo before, Dr. Carbonell?

15 "A. I don't recall so.

16 "Q. Do you know who D. Funk is?

17 A. Dan Funk. I believe he was in the technical side of the  
18 fresh fruit business, quality control and product develop sort  
19 of assignment.

20 "Q. And I see that Mr. Haycox is copied on this memo. At the  
21 time, September 1998, Mr. Haycox was working for Del Monte  
22 tropical fruit division?

23 "A. He was chief operating officer.

24 "Q. We also have J. Nichols?

25 "A. I presume it's the J. Nichols of J. Nichols Company.

C42FFRE2

"Carbonell"

1 "Q. This is an October 28, 1998 intercompany correspondence  
2 from D. Funk. Do you recall seeing this document before?

3 "A. I don't believe I have.

4 "Q. Under the distribution list there's someone by the name of  
5 P. Bott. Do you see that?

6 "A. Paul Bott was at the time president and chief executive of  
7 Del Monte tropical fruit.

8 "Q. Directing your attention to page DMFP5533?

9 "A. Yes, sir.

10 "Q. Under the heading preserved fruit salad?

11 "A. Mm-hmm.

12 "Q. 'objective: Develop a formula for the preparation of a  
13 preserved fruit salad in Costa Rica which utilizes  
14 predominantly residual pineapple and melons.' Do you see that?

15 "A. Yes.

16 "Q. Do you know whether this is a reference to the same  
17 preserved fruit salad that's referenced in the Goldman Sachs  
18 offering memo that we looked at earlier?

19 "A. I don't know for a fact, but I believe. It has a high  
20 likelihood of being the same thing.

21 "Q. As I think we also discussed, after it acquired RJR  
22 Nabisco, KKR began efforts to sell Del Monte, correct?

23 "A. I would express it a little differently. KKR instructed  
24 me to sell Del Monte. I was at the time chairman and CEO of  
25 Del Monte Corporation, which included the whole Del Monte

C42FFRE2

"Carbonell"

1 business.

2 "Q. And so you were tasked with the assignment of selling Del  
3 Monte?

4 "A. Correct.

5 "Q. And at some point KKR agreed to sell the Del Monte  
6 tropical fruit business to Polly Peck as we discussed, correct?

7 A. Well, on Monday morning when we all went back to work from  
8 the weekend we were told that we had sold them.

9 Q. And at some point after that, Del Monte and Polly Peck  
10 entered into a license agreement, correct?

11 "A. Yes. Some period of time after that.

12 "Q. That was the license agreement that permitted Polly Peck  
13 to use the Del Monte trademark on certain products in the  
14 United States and elsewhere, correct?

15 "A. Correct.

16 "Q. Just so we're clear, at the time of the license agreement,  
17 you were chairman and CEO of Del Monte, correct?

18 "A. Del Monte Corp., yes."

19 MR. DREYER: Your Honor, we have just a short read,  
20 then back to the video.

21 THE COURT: All right. Just for the record, sir tell  
22 us your name.

23 MR. FEIRMAN: Jordan Feirman.

24 THE COURT: Mr. Feirman is going to read the part of  
25 Mr. Carbonell.

C42FFRE2

"Carbonell"

1 "Q. Let me hand you what we've premarked as Exhibit 1.

2 MR. DREYER: If you could put that up.

3 "Q. Do you recall this document? It's titled the DMC Wafer  
4 license.

5 "A. Yes, sir.

6 "Q. What is this, what is it?

7 "A. It's an agreement between Del Monte Corporation and a  
8 subsidiary of Polly Peck International, PLC. It is a licensing  
9 agreement that Del Monte grants certain use rights for its  
10 trademark the Polly Peck subsidiary.

11 "Q. What if any role did you have in the negotiation of any  
12 aspects of this agreement?

13 "A. I participated in the negotiation of certain aspects of  
14 this agreement.

15 "Q. When did you participate in those negotiations?

16 "A. When in time?

17 "Q. Yes.

18 "A. I recall between September and December of 1989. After  
19 the, you know, Polly Peck surfaced and had a deal with KKR for  
20 the purchase of Del Monte tropical fruit.

21 "Q. Which were the portions that you recall you negotiated?

22 "A. Negotiated is, may not characterize what went on. At the  
23 time we had Shearman & Sterling representing the acquiring  
24 group for Del Monte which I was associated with and so I had  
25 discussions with Shearman & Sterling. I had discussions with

C42FFRE2

"Carbonell"

1 Merrill Lynch with primarily Dennis Kelly was the  
2 representative who was associated with this purchase and then,  
3 of course, we will get feedback like we get drafts back from  
4 Shearman & Sterling and we will react and discuss them. But in  
5 the classic sense of getting all down into the room as we are  
6 here today, I don't recall that it might have happened only  
7 once.

8 "Q. Do you recall a specific time when it actually happened or  
9 is this a--

10 "A. Not in terms of the specific date. It was around the  
11 middle because I recall that Mark Ellis from, who represented  
12 Polly Peck in the U.S., an employee of Polly Peck, came into  
13 that meeting, but I don't recall the time, I mean, it's ten  
14 years ago.

15 "Q. Do you remember the specific discussions that ensued with  
16 Mr. Ellis that you participated in or that you were present  
17 for?

18 "A. After the initial agreement with KKR, Polly Peck felt that  
19 they had bought the brand for fresh fruit as opposed to  
20 receiving a license and their main interest was to retain what  
21 they thought they had, they were buying. As I said earlier, I  
22 wasn't privy to the discussions between KKR and Polly Peck, so  
23 I don't know what was represented or misrepresented, but when  
24 we were back on the track to acquire the processed foods, KKR  
25 acknowledged to us that they had intended to do that and we

C42FFRE2

"Carbonell"

1 acknowledged to KKR that it was our intent to make sure that  
2 the Del Monte Corporation retained the ownership of the brand  
3 and that the license agreements offered Del Monte Corporation  
4 the rights to control the quality levels of the products that  
5 bore the Del Monte brand.

6 MR. DREYER: I believe there's a little bit more.

7 MR. FEIRMAN: I think I'm missing that page. Sorry.

8 MR. DREYER: It's page 38, line 8.

9 "A. And lastly, we wanted to make sure that they were not  
10 going to become a competitor of Del Monte, Del Monte  
11 Corporation by entering product areas where they were not  
12 present at the time of the sale and that was the plain subject  
13 or the discussion of that meeting was to reassure Polly Peck  
14 that that was our position, to clarify to Polly Peck that that  
15 was our position and to reassure them that we had every intent  
16 for them to do their business subject to the limitations that  
17 were to be negotiated in the future prior to the existence of  
18 this agreement.

19 "Q. What if anything do you recall Mr. Ellis said?

20 "A. On this occasion?

21 "Q. Yes.

22 "A. I think Mr. Ellis, if memory serves me right, besides this  
23 agreement, there were other issues that we had to discuss, and  
24 his participation was most active in these other areas which  
25 related to Del Monte Philippines.



C42FFRE2

"Carbonell"

1 "Q. At this meeting did Mr. Ellis indicate that he understood  
2 what Del Monte Corporation's position was as you said it was  
3 stated and that this was acceptable to Mr. Ellis?

4 MR. DREYER: Let's have the last piece of the video.

5 "Q. Does that refresh your recollection whether you met with  
6 Mr. Ellis on behalf of Polly Peck?

7 "A. I think this refers to where I just related to you as the  
8 only Polly Peck meeting that I recall.

9 "Q. Right. And that was with Mr. Ellis?

10 "A. Well, he was present. I mean it wasn't a one-on-one.

11 "Q. Do you recall who else was present?

12 "A. Lots of lawyers from both sides. And I don't recall  
13 anybody but lawyers, basically.

14 "Q. Dr. Carbonell, at this time in 1989, the processed  
15 division was not selling any of its products in the produce  
16 section of the supermarkets, correct?

17 "A. I believe that's correct.

18 "Q. The parties were not competing in this area, were they?

19 "A. I believe that's correct.

20 "Q. So just so we're clear, let me ask you the question I  
21 previously asked you. During the drafting of Exhibit B prior  
22 to the time of it being executed, are you aware of anyone on  
23 behalf of Del Monte or RJR or KKR communicating to Polly Peck  
24 the belief that Polly Peck would not be able to put the Del  
25 Monte mark on products that were being sold by J. Nichols?

C42FFRE2

"Carbonell"

1 A. I don't have direct knowledge of that, sir."

2 MR. DREYER: Your Honor, nothing further from the  
3 witness.

4 THE COURT: All right, thank you.

5 MR. GONZALEZ: Your Honor, just for the record, the  
6 reading of the Carbonell deposition was from October 13, 1998.

7 THE COURT: Thank you, sir.

8 MR. DREYER: Your Honor, we have Dr. Jacoby. I'm not  
9 sure if this is an appropriate time to call a break.

10 THE COURT: Mr. Gonzalez, the reading did not take  
11 place in 1998. The reading of what was from 1998?

12 MR. GONZALEZ: The part where we just did a mock --  
13 that deposition that they were reading from took place on  
14 October 13 of 1998?

15 THE COURT: Oh, thank you. All right, thank you.

16 MR. DREYER: And the videotaped portion was from  
17 September 2010, as you just saw.

18 THE COURT: I understand.

19 We're going to bring back now the witness who was on  
20 the stand the end of Thursday. Call him, please.

21 All right, ladies and gentlemen, we're going to pick  
22 up now with the witness who was on the stand on Thursday. It  
23 also is a Fresh Del Monte witness, because this is all part of  
24 Fresh Del Monte's case.

25 Welcome again, Dr. Jacoby. I remind you again that

C42FFRE2

Jacoby - direct

1 you remain under oath. You understand that, is that correct?

2 THE WITNESS: Yes, I do.

3 THE COURT: Please be seated. Move your chair forward  
4 and we'll continue where we left off on Thursday. Mr. Plevan,  
5 your witness, sir.

6 MR. PLEVAN: Thank you, your Honor.

7 JACOB JACOBY,

8 called as a witness by the Plaintiff,

9 having been previously duly sworn, testified as follows:

10 DIRECT EXAMINATION (Cont'd)

11 BY MR. PLEVAN:

12 Q. Dr. Jacoby, when we ended on Thursday afternoon, do you  
13 recall that we were beginning to discuss your analysis of the  
14 Hall & Partners data?

15 A. Yes.

16 Q. Before we go back to that Hall & Partners data let's go  
17 back and tie up some loose ends on the data that you generated  
18 in your survey.

19 MR. PLEVAN: Could we have demonstrative 5? Thank  
20 you.

21 Q. Dr. Jacoby, I know you went over this the other day but go  
22 to the fifth column. What does that data show?

23 A. Where it says "preserved"?

24 Q. Right. The preserved.

25 A. Remember, the respondents were asked regarding the fruit in

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Jacoby - direct

1 the container whether they thought it was fresh, preserved and  
2 they could say don't know, so in the fourth column we have the  
3 percent who said fresh. In the fifth column we have the  
4 percent who said preserved and in the sixth column we have the  
5 percent who said don't know.

6 Q. All right. Now, at your deposition you were asked  
7 questions about the responses among those who said that the cut  
8 fruit was preserved, the fifth column. Are those responses in  
9 your view relevant to understanding why respondents believe  
10 that the Del Monte Corp.'s cut fruit was fresh?

11 A. No, they're not. We know not everyone took away a fresh  
12 meaning. Some people thought the various items we showed them  
13 were preserved and some said don't know. The key consideration  
14 that the study was directed towards was to find out what  
15 percent thought these various items contained fresh fruit.

16 Q. Is there any useful exercise in comparing various numbers  
17 in that fifth column?

18 A. No.

19 Q. Now, if we could have Exhibit 129, page 8. Dr. Jacoby, you  
20 testified last week about removing the product from sight, do  
21 you recall that, before question 2A was asked?

22 A. Right.

23 Q. Now, at your deposition you were asked whether you should  
24 have left the product there while the questions that followed  
25 were asked. Do you recall that?

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Jacoby - direct

1 A. Yes, I do.

2 Q. Now, do you view that as a proper criticism of your survey?

3 A. No, I do not.

4 Q. Explain why, please?

5 A. Well, there's, in this agreement across the courts  
6 actually, there are circumstances under which you leave  
7 something in view and under which you take it away. Some  
8 courts tell you if you leave it in view it's a reading test.  
9 Some courts say if you take it away it's a memory test. The  
10 question is what's realistic. In the real world the consumer  
11 doesn't take the package away, it's not taken away.

12 However, in the real world you don't have people who know  
13 they're sort of in a test situation, that they're going to be  
14 asked questions about this. In the real world you don't have  
15 an interviewer there asking them questions and in the real  
16 world you don't have a situation where when the questions are  
17 asked when they don't have that information in their mind they  
18 can go look at the package and read from the package as opposed  
19 to tell you the impressions that they had from having looked at  
20 the package before for as long as they wanted.

21 So there are tradeoffs, and in this circumstance, by far,  
22 in my opinion, the appropriate approach was to remove the  
23 product from view, as is done, I should say, most of the time.

24 Q. Most of the time in consumer surveys?

25 A. Of this sort, yes.

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Jacoby - direct

1 Q. Now, is there research that shows how much time consumers  
2 actually spend looking at a product before they buy it?

3 A. Yes. We have a considerable amount of research that shows,  
4 A, for frequently purchased products like this, they paid  
5 hardly any attention to the product. They usually read three  
6 to five items of information if that, and they usually spend  
7 around four to six seconds making the decision.

8 Q. Now, if we could look at question 2A, which I believe  
9 follows on the next page, and you can blow up the top. Thank  
10 you. Now, you testified this was the key question in the first  
11 part of your survey, Dr. Jacoby?

12 A. Yes.

13 Q. Now, at your deposition you were asked a number of  
14 questions about the fact that the terms "fresh" and "preserved"  
15 that are used in this question were not defined. Do you recall  
16 that?

17 A. Yes, I do.

18 Q. And is that a valid criticism of your survey design?

19 A. I don't believe so.

20 Q. Why not?

21 A. Well, for several reasons. Fresh and preserved are  
22 basically opposites in this context. They define each other.  
23 If it's fresh, it's not preserved. If it's preserved, it's not  
24 fresh. It's either/or. They're mutually exclusive. If you  
25 start running around defining every term for consumers, A, some

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1 are going to get insulted. I mean, if I were to go and define  
2 here's what fresh fruit is, by the way, fresh is blah, blah,  
3 blah, some consumers are going to be insulted and it's going to  
4 extend the interview, make it in some respects more confusing.  
5 It's just not done for simple terms that consumers use in their  
6 daily lives and understand in their daily lives.

7 Q. Well, Dr. Jacoby, can the word "fresh" in a different  
8 context mean something else?

9 A. Sure. You can talk about that fresh young thing on  
10 Broadway. You can talk about my daughter, who isn't fresh,  
11 she's eleven, but you could say she's fresh. Context -- the  
12 meaning's defined in the context. The words have a context.

13 Q. Dr. Jacoby, in your deposition you were asked if the word  
14 "fresh" could mean not spoiled. Now, in this context does that  
15 make any sense that fresh would mean not spoiled?

16 A. No. Consumers -- well, let's say manufacturers don't sell  
17 food that's not spoiled or spoiled. There's not a category of  
18 spoiled food and not spoiled food.

19 Q. All right, now, if we could go back to page 129. 008. I'm  
20 sorry, Exhibit 129-008 and if you could focus on Q1F and G at  
21 the bottom. Dr. Jacoby, you were asked a lot of questions at  
22 your deposition about the use or non-use of a filter in this  
23 survey. So first, could you explain to us what is a filter?

24 A. A filter is the question asked before you ask another  
25 question. It's designed to pull out individuals who may not

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1 have an opinion. For example, in this case, the full filter  
2 would be do you have an opinion as to whether or not the fruit  
3 in this container is fresh or preserved? And if the people say  
4 no, I don't have an opinion, then you wouldn't ask them is it  
5 fresh or preserved. The problem with full filters, though, is  
6 as pointed out in the Federal Judicial Center's Reference  
7 Manual on Scientific Evidence is that it's an easy way for  
8 people who know that they're going to be asked a question  
9 afterwards to cut down on the number of questions they're being  
10 asked to move the interview forward and get out quicker. And  
11 so even if they do have an opinion they are inclined to say no,  
12 I don't know.

13 Q. What did you do here to make sure that respondents wouldn't  
14 give an answer that they didn't really know the answer to?

15 "A. I used what's called a quasi filter, which is what is  
16 recommended in the Federal Judicial Center's Reference Manual  
17 on Scientific Evidence, both in the 2000 version and I have a  
18 prepublication copy of what's coming out in a few months in the  
19 2012 version. It's even more emphasized there that full  
20 filters are to be preferred over -- excuse me, that quasi  
21 filters are to be preferred over full filters.

22 Q. Go to the next page on the top, I guess. Show us in this  
23 language what is the filter, the quasi, you called quasi filter  
24 you used.

25 A. Right. Remember, it comes immediately after them being



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1 told they can say don't know to any question, don't guess.

2 Then it comes to this question --

3 Q. One second. So, Dr. Jacoby, if we go back, those are the  
4 questions at the bottom of this page which is Exhibit 129, the  
5 eighth page? This is the instructions regarding don't guess?

6 A. Exactly. If you don't know or don't have an answer don't  
7 guess, just say don't know and we'll go on.

8 THE COURT: And you say this is a quasi filter.

9 THE WITNESS: No, your Honor, the quasi filter comes  
10 in on the very next question, 2A. And the quasi question says  
11 if you can tell. It sort of tells them -- I don't ask them  
12 does this cut fruit product contain fresh fruit or preserved  
13 fruit there's no forced choice there. It says, if you can  
14 tell, does this cut fruit product contain fresh fruit or  
15 preserved fruit?

16 THE COURT: Can you give the jury an example of what a  
17 complete filter is?

18 THE WITNESS: Yes, I did. Let me give it again.  
19 Instead of 2A, if you take out the "if you can tell," maybe  
20 I'll ask the question 2 before 2A and question 2 would be do  
21 you have an opinion on whether this cut fruit product contains  
22 fresh fruit or preserved fruit? And if they say no, I don't  
23 have an opinion, then I wouldn't ask them does it contain fresh  
24 or preserved.

25 THE COURT: All right.

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Jacoby - direct

1 THE WITNESS: But here I've put them both into one  
2 question.

3 THE COURT: All right, I understand. And you're  
4 saying there's some manual that you say prefers this method?

5 THE WITNESS: Yes. It's the --

6 THE COURT: All right. Thank you.

7 Q. Dr. Jacoby, let's move on now to the next page of your main  
8 questionnaire, and there were two additional questions.

9 Highlight both of those together. The first one is, "What in  
10 particular makes you say that?" Do you see that?

11 A. Yes, I do.

12 Q. And then the second question, "Can you tell me more about  
13 that?" Dr. Jacoby, explain to us -- these are why questions,  
14 why you asked. You put these questions in your survey?

15 A. It's customary to include questions like this, but they're  
16 used for different purposes. The most frequent purpose is to  
17 try to identify bizarre answers, to see if people are coming  
18 out with things that don't make sense in this context. "Why do  
19 I say that? Because my sister-in-law told me this product has  
20 fresh fruit," or for somebody to say, "I don't know, I just  
21 guessed." It gives them an opportunity then to clean the data  
22 out for answers like that. We found no such answers like that.

23 Q. So therefore no responses were eliminated, is that what  
24 you're saying?

25 A. No responses were eliminated and no matter what they said

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1 here it wasn't then followed up with probes and specifically,  
2 which is typical if you want to go further, closed-ended  
3 questions.

4 Q. Let me stop you there. At your deposition you were asked  
5 for a number of pages questions about the answers to the why  
6 questions. So what was the argument that was being made and  
7 what's your response to it?

8 A. The argument is I should have paid attention to what people  
9 said here as opposed to what the experimental data showed. By  
10 experimental data, those were the different groups who then got  
11 the question 2A, if you can tell is this fresh fruit or  
12 preserved fruit. Experimentation is the gold standard in  
13 science for figuring out cause and effect, and there's  
14 tremendous amount of literature in the social sciences, which  
15 even Dr. Simonson, who is in the back of the court, has quoted  
16 and has used in his doctoral seminars.

17 Q. Dr. Jacoby, what were the answers that were given that you  
18 were pointed to, the general nature of the answers in those  
19 responses?

20 A. The answers in particular, a lot of people said when asked  
21 why do you think, what in particular makes you say that it's  
22 fresh fruit, they said because it looks fresh, because I can  
23 see the fruit.

24 Q. So this was the appearance of the fruit?

25 A. It's the appearance of the fruit, yes.

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Jacoby - direct

1 Q. And again, why then did you not take that into account in  
2 evaluating the results?

3 A. Because we have the experimental data which trumped these  
4 verbal reports. The experimental data we have people randomly  
5 assigned to these cells, they were all coming in the same pool,  
6 customers of cut fruit products. We know from their answers to  
7 that question 2A what was influencing them even though --  
8 there's tremendous literature on this -- people don't always  
9 know the reasons why they're influenced, what causes them to  
10 come to a particular judgment.

11 THE COURT: Let me ask this, sir, and, Mr. Plevan,  
12 I've neglected to give the jury its mid-morning break, so  
13 whenever you think is a logical time I'll do that now.

14 MR. PLEVAN: Well, your Honor, if you have a  
15 question --

16 THE COURT: No, I'm going to ask it.

17 MR. PLEVAN: Ask your question.

18 THE COURT: Don't look for me to put words in your  
19 mouth. I'm just trying to understand, as I said I believe on  
20 Thursday. Go back to the slide before, please. Yes, can you  
21 tell me more about that. Are you saying that you used, you  
22 employ the answer to 2C only to the extent of weeding out the  
23 outliers just seemed like a good answer, something like that,  
24 and only for this purpose?

25 A. Yes. In this case, your Honor, because we have an

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Jacoby - direct

1 experiment and the experimental data by far trumps --

2 THE COURT: I understand that. But if somebody said  
3 the fruit looks fresh in 2C, you would not include that in your  
4 calculations?

5 THE WITNESS: That's in the report, but I wouldn't pay  
6 attention to that, because there's so much literature and I  
7 have a bunch in my pocket I could pull out and read to you  
8 verbatim, of the most regarded scientists in behavioral  
9 science --

10 THE COURT: That is the experimental data that is the  
11 earlier questions is what you ought to be focusing on, is that  
12 your point?

13 THE WITNESS: No, that you can't rely on the data in  
14 these questions because things operate on such a subconscious  
15 level. When you ask why do you say the fruit in this container  
16 is fresh, people aren't thinking about the fact that, oh, it  
17 was chilled and I saw it in the fresh produce section or it's  
18 in a plastic see-through container. That doesn't occur to  
19 them. When you ask them why is the fruit fresh they're saying,  
20 oh, because it looks fresh. They're focusing on the object of  
21 the question and not realizing all these other influences that  
22 have impacted on their response. The experiment teases those  
23 influences out.

24 THE COURT: All right. Thank you. Let's take a  
25 ten-minute break, ladies and gentlemen.

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Jacoby - direct

1 (Recess)

2 o0o

3 (In open court; jury present)

4 THE COURT: Please be seated. You may continue.

5 MR. PLEVAN: May I have demonstrative 5 back on the  
6 screen?

7 Q. Dr. Jacoby, was your understanding that looking at the two  
8 products you have in front of you, I've given you back Exhibits  
9 166 and I think the other one is 188, is that right? Those are  
10 the two that you used in the survey as well as the cans,  
11 correct?

12 A. Yes.

13 Q. Looking at those two products, was your understanding that  
14 the grapefruit is the same?

15 A. My understanding is the grapefruit is the same in all three  
16 products.

17 Q. Now, you indicated that some of the data indicated that the  
18 appearance of the fruit was not driving the results. Can you  
19 illustrate by pointing to the data you had reference to on the  
20 demonstrative 5?

21 A. Sure. There are several things.

22 Q. I can have -- Todd, if you can highlight --

23 A. Here we go, Mr. Plevan. First take a look at this. You  
24 have the fruit bowl and the fruit bowl chilled in the fresh  
25 produce aisle versus the canned file. It's the exact same

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Jacoby - direct

1 product, exact same fruit, etc., or type of fruit. Here you  
2 see a 20 percent difference. Then you take a look at the fruit  
3 bowl chilled versus the SunFresh chilled. Again, it's the same  
4 product. This is in the plastic container but it's not a thin,  
5 flexible container and it's not the shape that you usually find  
6 in the Korean deli.

7 So again, you have here about a 12-1/2 percent difference.  
8 The fruit isn't determining that. The appearance of the fruit  
9 isn't determining that.

10 You could also take a look at the -- again, the fruit bowl  
11 in the chilled produce versus again this SunFresh when it's in  
12 the canned aisle. Over there you got a 14-1/2 percent  
13 difference between 38 and 52.4. These differences are  
14 consistent. You don't have them inverted. You don't have more  
15 people saying it's fresh when it's in this large container as  
16 opposed to the fruit bowl. The data fit, they have what we  
17 call technically nomological validity.

18 Q. But what is the point with respect to the appearance of the  
19 fruit?

20 A. The appearance is the same in all of these, where you can  
21 see the fruit. So if it's the appearance of the fruit if  
22 that's what's going on it ought to be roughly the same in all  
23 these different groups, but it's not. What's driving these  
24 differences are the nature of the packaging, the section of the  
25 supermarket in which the package was found and whether it was

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Jacoby - direct

1 chilled or at room temperature.

2 THE COURT: Sir, earlier you said "there" and you hit  
3 the larger product. What is it? Look at the tab.

4 THE WITNESS: Exhibit 188.

5 THE COURT: And you contrasted that to what you called  
6 the fruit bowl, which is exhibit --

7 THE WITNESS: 166, your Honor.

8 THE COURT: Thank you.

9 Q. Now, Dr. Jacoby, you referred to professional literature.  
10 Is there a specific article that is a leading article in this  
11 area?

12 A. There are many articles. The one that I mentioned,  
13 Professor Simonson, I and virtually everyone uses is the one by  
14 Nisbett and Wilson. It's one of the most cited articles in all  
15 the social sciences with over 3,600 citations as of a few days  
16 ago. There are articles by William McGuire of Yale University,  
17 the National Science Foundation. There are articles by leading  
18 cognitive psychologists which all say the same thing.

19 Q. And what is that same thing?

20 A. That same thing is that we're not aware, all of us, human  
21 beings are not aware of the subtle things and the unconscious  
22 things that make us decide, come up with one decision or one  
23 judgment versus another. They're in uniform agreement in that  
24 and the research is in uniform agreement on that.

25 THE COURT: It is uniform, you said?



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Jacoby - direct

1 THE WITNESS: It is uniform.

2 Q. If you do want to evaluate the influence of contextual  
3 clues, how do you go about doing that?

4 A. The way I did it with an experiment, but if you want to ask  
5 directly you can ask directly, which is part 2 of my study  
6 where I asked them about a whole variety of contextual views.

7 Q. Could we have demonstrative 6? This is the part 2 you had  
8 reference to?

9 A. Yes.

10 Q. And if we can go look at 7, demonstrative 7. And these  
11 were the responses you got?

12 A. Correct.

13 Q. At your deposition you were asked why you did not include  
14 in your part 2 questions such as if the product has a label.  
15 Now, why did you not include those?

16 A. Well, number one, it didn't occur to me. But number two,  
17 it wouldn't have been relevant. The question was why did they  
18 think it's fresh. What factors? They had all, they being the  
19 consumers, had all the time they wanted to look at the package.  
20 They knew they were going to be questioned about it. It has a  
21 label on it. They could have answered any way they wanted.

22 Over here I didn't have that as a question. A, I didn't  
23 think of it, and, B, even if I did, it's not relevant to  
24 determining why they think it's fresh.

25 Q. One final question about the arguments that the defendants

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Jacoby - direct

1 have raised about the appearance of the fruit. At your  
2 deposition you were asked a number of questions about why you  
3 didn't show consumers the fruit without packaging, for example,  
4 just in a bowl.

5 A. Right.

6 Q. What's your comment on that?

7 A. Again, that's not the real world. I mean, at one point  
8 they're criticizing me for not being real world, then they're  
9 asking me to do something that isn't real world. Fresh fruit  
10 is not sold in bowls or in dishes by itself. It's sold in a  
11 package. I tested what's out in the real world, the packages,  
12 where they appear in store in the various sections of the  
13 supermarket.

14 Q. Following up on that point, you have the big SunFresh which  
15 is 188, correct?

16 A. Yes.

17 Q. What is your understanding as to where this is actually  
18 sold at retail?

19 A. This is sold in large stores, which might be characterized  
20 as warehouse stores, such as Costco, I believe Wal-Mart, but  
21 I'm not, as I sit here now, I haven't gone back and checked on  
22 this recently. It is not sold in regular supermarkets. A  
23 smaller version of this in a glass jar is sold in supermarkets.

24 Q. And "this" being 188?

25 A. Correct, 188, as you identified it.

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Jacoby - direct

1 Q. Why, then, did you use the larger one that's sold in the  
2 box stores or the warehouse stores?

3 A. Because I wanted to make sure I had another plastic  
4 container, number one, and number two, it is sold to consumers  
5 in these large stores where they can buy them. It's not a fake  
6 product. It's out there for consumer use.

7 Q. All right, now, Dr. Jacoby, we're now --

8 A. Excuse me, if I could just add to that answer. In my  
9 understanding, and I've lived 72 years now, is that things in  
10 jars tend to be preserved, they're not fresh. So had I put it  
11 in a jar it would have been, my understanding is more consumers  
12 would have thought it was preserved fruit than would have  
13 thought it was fresh fruit. The issue that I was testing is  
14 plastic in a thin, see-through as opposed to much harder,  
15 inflexible portion.

16 Q. Okay, now we're back to Hall & Partners, which is where we  
17 left off at the end of the day on Thursday. For just a quick  
18 review, if we could look at Exhibit 58, page 43, with the  
19 three -- all right. These were the print ads that were being  
20 surveyed, correct?

21 A. Yes.

22 Q. And if we go to the next page, at the bottom we have the  
23 question, you recall, what was the question, again, that the  
24 participants were asked?

25 A. Now, thinking about the advertising you have just seen,

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Jacoby - direct

1 what was the main message that the ad was trying to  
2 communicate? It also has what were your impressions of Del  
3 Monte.

4 Q. In communications research, what does "main message" mean?

5 A. Well, most advertisements and most communications you can  
6 expect more than one meaning from. Now, they wanted to know  
7 what was the single most important thing or the single most  
8 frequent and common thing that consumers were getting out of  
9 this communication, and so they asked, thinking about the  
10 advertising, what was the main message that the ad was trying  
11 to communicate to you, and --

12 Q. How do you get the rest of the communications in addition  
13 to main message?

14 A. It's traditional communication research to follow this up  
15 with what other message, what other messages, if any, was the  
16 ad trying to communicate to you.

17 Q. And was that followup question asked here?

18 A. No.

19 Q. Now, if you would look at the top of the page, this is  
20 what -- is this what Hall & Partners reported to Del Monte was  
21 the main message?

22 A. Yes.

23 Q. Can you read it from this? If you can, if you can open  
24 your book?

25 A. I can read it, the highlighted portion. Most respondents

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Jacoby - direct

1 were able to play back that the advertising was about -- that I  
2 can't read, I'm sorry, it's a little blurry here.

3 Q. We're at Exhibit 58, if you have a copy. You should have a  
4 copy of 58 with you.

5 A. That is page --

6 Q. 43 of the report.

7 A. I've got it. Excuse me. My arms don't reach that far.

8 Ah, that's better.

9 What Hall & Partners' caption at the top of the page is --

10 Q. Put it in quotes so we know you're reading.

11 A. Quote: "Most respondents were able to play back that the  
12 advertising was about 'fresh products' that are 'healthy' and  
13 'ready to eat.' The latter messages came out much stronger in  
14 the grapefruit advertisement."

15 Q. Okay. Now, you also testified last time, if you could take  
16 that down and go to the left column, where you referred to the  
17 coding on the left page, same page with the left column. You  
18 told us last time about how you didn't accept that and you got  
19 the codes, do you recall, and we had Exhibits 88-89?

20 A. Right, because I couldn't make sense out of "fresh look of  
21 the product." I saw that as being different than "it is fresh"  
22 as opposed to "looks fresh" and I wanted to see how many said  
23 it was fresh.

24 Q. All right. And what, then, did you do and what were your  
25 conclusions about what that data showed about the main message

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Jacoby - direct

1 when you looked at the verbatims?

2 A. What I did was I requested the verbatims, these were the  
3 answers that people gave to this question. I got all the  
4 answers and I looked at them and I set up my own codes. I  
5 counted people who said the fruit is fresh. I counted people  
6 who said the fruit is natural and I counted the people who said  
7 the fruit didn't have preservatives or additives. And when I  
8 did that, I found that roughly 27 percent of the people, which  
9 comes very close to what they had, including the other factors,  
10 about 27 percent of the people came out with a meaning that the  
11 fruit there was fresh.

12 MR. PLEVAN: Could I have demonstrative 8, please?

13 Q. Now, what is demonstrative 8 showing? I know we can't read  
14 it, but tell us what it says.

15 A. These are the three ads at the top. Sorry about that. It  
16 reads on the left mango, peach and grapefruit; peach being in  
17 the center, grapefruit underneath and these are all the  
18 respondent numbers that I found based on my analysis of the  
19 Hall & Partners data said that the fruit in the ad was fresh,  
20 contained no additives or preservatives or wasn't natural.

21 Q. If we go to the numbers at the bottom. Are these the  
22 percentages that you found for each of the three different ads?

23 A. Yes. 30, 24, 28. When you average them out it's around 27  
24 something.

25 Q. All right, now, Dr. Jacoby because of Mr. Xander Shapiro's

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Jacoby - direct

1 testimony last week about what Hall & Partners counted or  
2 didn't count, words such as "refreshing" and "looks fresh,"  
3 just to be sure, did you count in your count of the confused  
4 customers consumers who said in this, the women in this survey  
5 who responded that the fruit looked fresh?

6 A. No.

7 Q. Did you count someone who may have said refreshing?

8 A. No.

9 Q. Did you count near fresh?

10 A. No. I only counted people who, as I said, said the fruit  
11 is fresh.

12 Q. You said you counted natural?

13 A. Right.

14 Q. Why natural?

15 A. Well, natural means that there are no preservatives, no  
16 additives.

17 Q. Suppose in connection with the peach, the one in the  
18 middle, if you would, which as I understand your testimony was  
19 that there's additives but no preservatives, if you had not  
20 counted natural there, what difference would it have made?

21 A. Hardly any. I found of all these people that I list here,  
22 and I've forgotten how many there were, 40 or 50 roughly, who  
23 sold a peach, only five would be counted just because they said  
24 natural.

25 Q. And the total number of individuals who you listed up

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Jacoby - direct

1 there, do you recall what that number is out of the total  
2 survey?

3 A. Offhand, I don't know.

4 Q. Was it 134?

5 A. It was 134 out of slightly under 500.

6 Q. Now, if we could go to demonstrative 9A, and if you could  
7 just perhaps the first column.

8 A. Well, again, here are the answers that --

9 Q. What does this illustrate?

10 A. On the left-hand side you see the respondent numbers in the  
11 Hall & Partners survey to respondent 65 said it was fresh  
12 fruit, easy storage. 67, number 67 said that the fruit was  
13 fresh. 84, it is fresh. 121, that it is all natural, nothing  
14 is added. 160, fresh fruit in your grocers aisle. 164, fresh  
15 fruit. 169, getting fresh fruit in a jar. So these are  
16 answers that illustrate people are saying this is fresh fruit.

17 Q. And these are the ones you counted?

18 A. Yes.

19 Q. So 9A is just examples taken of the approximately 130  
20 responses that you counted?

21 A. Correct.

22 Q. All right. If you would go to table 9B. Now, read some of  
23 these and what does this illustrate?

24 A. This illustrates when asked the main idea people are giving  
25 you different things. Some people come up with other main



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1 ideas. 54 said the fruit is already peeled for me. 93, you  
2 don't have to peel the fruit, it's already done for you. 282,  
3 the fruit was packaged for convenience. 292, already peeled.  
4 You can go on down that. The basic thing is they talk about  
5 how convenient this food is.

6 Q. Now, did you count those as part of the people confused?

7 A. No.

8 Q. Now, do you know from this survey whether these people also  
9 had a secondary meaning that the fruit was fresh?

10 A. No. They were never asked a second question about what  
11 other meanings did you get from the ad, so these people who may  
12 have said convenient may have also, some or all of them, some  
13 proportion of them at the very least might have also said it  
14 was fresh, but I couldn't get to count those in addition to the  
15 people I already counted.

16 Q. All right, if we would look at demonstrative 9C. What are  
17 these examples you picked out?

18 A. I picked these out because it shows that people know the  
19 difference between fresh and preserved. I mean, when they say  
20 nothing added like extra sugars, nothing added, just fruit, all  
21 natural, nothing added, very fresh and natural, no  
22 preservatives. They know, they can compare whether it's fresh  
23 or has preservatives. Lay consumers, you and I, our spouses,  
24 their adult kids, when they go into the supermarket they know  
25 the difference between fresh and preserved.

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Jacoby - direct

1 Q. All right, Dr. Jacoby, if you go back to Exhibit 58, page  
2 43, we get the three print ads together. I know it's difficult  
3 to read, but rather going and focusing on each one, do these  
4 ads specifically state in so many words that the products that  
5 are being advertised are fresh?

6 A. They do not.

7 Q. What, then, does the consumer research do to help explore  
8 the meaning that consumers get?

9 A. Well, again, as a manufacturer, you want to know what the  
10 consumer take-away is, what understandings they take away from  
11 your advertising. And if you are about to embark on a campaign  
12 to use that as a benchmark to see if you can change their  
13 understandings in a way that the advertising is designed to  
14 change them. That was the purpose of the study, to take a look  
15 at what consumers understood by looking at these ads and they  
16 were looked at one at a time and in my opinion it wasn't  
17 thoroughly examined, it was just the main idea, but that was  
18 the main idea for communication and we found just asking that,  
19 that more than a quarter, almost a third came out thinking that  
20 the fruit in these containers were fresh fruit.

21 Q. Have you seen in the course of this case any analysis of  
22 the data from Hall & Partners by somebody else, the report  
23 itself by someone on behalf of defendants doing any reanalysis  
24 or analysis of the data?

25 A. I had not. I had asked if there were any and I have not

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1 seen any.

2 Q. If we would go to page 045 of this exhibit? Now, this is  
3 the question, you have it in front of you, too, Dr.,  
4 Dr. Jacoby. It's the right page, page 42, this is the likes  
5 and dislikes.

6 A. Yes.

7 Q. Mr. Xander Shapiro was asked about this data last week.  
8 What is this question getting at? Is it addressing the product  
9 being advertised or something else?

10 A. No, it was addressing the ad, their likes and dislikes  
11 about the ad. I've got the question here. Quote, "What if  
12 anything did you specifically like about the advertising,"  
13 unquote. So it's asking about the advertising and it's not  
14 surprising that people are referring to, oh, I like the design,  
15 the pictures, the graphics.

16 Q. You better slow down, Dr. Jacoby. You were talking a  
17 little too fast.

18 A. Sorry. I'm a kid from Brooklyn.

19 Q. Go ahead. You can continue your answer. I just was  
20 concerned you were starting to talk too fast.

21 A. Basically, the likes and dislikes referring to what the  
22 people are saying in answer to the question what do you like  
23 about the ad, what did you dislike about the ad. It's not  
24 about the product in the ad, it's not about the fruit, it's  
25 about the ad itself what was called the ad execution in

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1 advertising language.

2 Q. Does this have anything to do with the analysis about the  
3 minimum percent misled by the print ads?

4 A. No, not at all.

5 Q. If we go to the next page, page 45. Mr. Shapiro was asked  
6 questions about this as well. And can you explain what's  
7 happening here in terms of how these questions are being asked  
8 of the women, approximately a little bit less than 500 women in  
9 this survey?

10 A. Well, the question they were asked -- there were nine  
11 statements which are appearing down the left-hand side of the  
12 page, and the question at the top of the page, which of these  
13 statements describes the messages presented in the  
14 advertisement. And it gives them nine things to select from.  
15 The products have been peeled, the products are refreshingly  
16 cool, etc.

17 Q. Does this in any way, the responses have anything to do  
18 with the number who were misled?

19 A. No, because there's nothing here, there's no questions  
20 about the products in the ad or in the packages containing  
21 fresh fruit.

22 Q. Fresh fruit or preserved fruit?

23 A. Exactly, or preserved fruit, they weren't asked either of  
24 those questions.

25 Q. Dr. Jacoby, you have in total discussed three separate sets

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1 of data, is that right?

2 A. Yes.

3 Q. And, very briefly, what are the three sets?

4 A. The first set is the experiment in my survey. The question  
5 2A, after having them view the video and go down the aisle, as  
6 it were, and then ultimately take a look at products 166, 188  
7 in the fresh produce aisle along with the fresh vegetables,  
8 etc., fresh fruit or in the canned aisle, then asking them does  
9 the product, what does it contain, fresh or preserved fruit.  
10 That's the first part.

11 Q. What's the second part?

12 A. The second part were these nine -- I don't know if there  
13 were nine, I think there were seven. The rules of thumb, I was  
14 asking them about those seven statements is, if it appears in a  
15 can is it fresh fruit or preserved fruit. If the fruit appears  
16 in the fresh fruit section of the grocery aisle, is it fresh  
17 fruit or preserved fruit, etc.

18 Q. And what was the third?

19 A. The third, the Hall & Partners data that I analyzed.

20 Q. Now, what if any observations did you make regarding  
21 comparing the results from these three different approaches?

22 A. They're all converging. They're all saying roughly the  
23 same thing, that there's a confusion level between 25 and  
24 30 percent. I mean, one could have said it was 10 percent,  
25 another could have said it was 90, but no. They're all the

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1 same. What we call convergent validity. This is exactly the  
2 kind of thing that we use in the sciences and engineering. If  
3 you're putting up a house, you don't have these guys site along  
4 one line to see where to put the corner, they site along the  
5 second line and where they intercept, that's called  
6 triangulation, where they triangulate is where you put your  
7 post in to put a corner in. All these studies, these three  
8 things that we're talking about, converge. They give you  
9 roughly the same level of deception, of confusion.

10 Q. Does that add to the credibility of the data?

11 A. Certainly does.

12 Q. Dr. Jacoby, do you understand that in this lawsuit the  
13 plaintiff Fresh Del Monte is challenging lines and products  
14 other than those you've tested?

15 A. Yes.

16 Q. Are the survey findings that you found limited to just the  
17 products you or Hall & Partners tested, just those, or do they  
18 apply to other products as well?

19 A. They apply to other products as well. Actually, between my  
20 study, which looked at the SunFresh, 188 and the red grapefruit  
21 bowl, 166, and Hall & Partners, which looked at these as well  
22 as another one of the ads was for a third one of the lines, so  
23 I think they're covering at least half of what Del Monte is  
24 putting out. But I think to answer your question directly --

25 Q. Well, Dr. Jacoby, let me give you samples.

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Jacoby - direct

1 A. Okay.

2 Q. I'm going to be handing you Fruit Naturals 146 and two  
3 SuperFruits, 162 and 165.

4 MR. PLEVAN: Your Honor, at this time I'd offer into  
5 evidence 162 and 165, which are samples of SuperFruits.

6 MR. ORR: No objection, your Honor.

7 THE COURT: Admitted, 162, 165.

8 (Plaintiff's Exhibit 162 and 165 received in evidence)

9 Q. Well, if you can proceed with your answer, Dr. Jacoby, now  
10 that you have examples.

11 A. All right. These are three others, one of which was tested  
12 by Hall & Partners, I don't recall which one. But this is  
13 Fruit Natural, this is SuperFruit, sorry, 146 is Fruit Natural,  
14 162 is SuperFruit, as is 165.

15 The point is, these are also in very flexible see-through  
16 packaging. They look like single servings of what's in the  
17 fruit bowl. To the extent that the products have the same  
18 characteristics as were tested, that is, they're in flexible  
19 see-through plastic packaging, they're found in the fresh  
20 produce section of the supermarket, not on the canned shelf and  
21 they're found in chilled fashion, then you can begin to  
22 generalize what we found from those products as well, that's  
23 done in science at times. You can't possibly test everything  
24 and the results of the three portions of, two portions of my  
25 study and the Hall & Partners converging as they do, indicates,

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Jacoby - direct

1 suggests that you can generalize from our findings to these  
2 products as well. The more of the characteristics they have in  
3 common with what we tested, the more the conclusions would hold  
4 up.

5 MR. PLEVAN: Could I have demonstrative 8 back up?

6 Q. Just focus on the data at the bottom. Is there data in  
7 Hall & Partners' study that supports your position on the  
8 generalization of this data to products not tested?

9 A. Yes. Again, these are. Two of these three products I  
10 believe were not tested, one of which did, or all three -- no,  
11 I'd have to take a look.

12 Q. But just focusing on --

13 A. Well, those two and maybe all three that were not tested  
14 you get the same level of confusion.

15 Q. At the three columns, if you look at mango, each one of  
16 these was a different fruit, correct?

17 A. Correct.

18 Q. And was each one of these; the mango, the peach and the  
19 grapefruit, in a different package?

20 A. Yes. To give you an example --

21 MR. ORR: Your Honor, at some point I have to  
22 intervene.

23 THE COURT: Sustained.

24 Q. Dr. Jacoby, I have just one additional set of questions for  
25 you. Your Honor, I've asked Dr. Jacoby just to look at three



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Jacoby - direct

1 places in the transcript where I believe there was a  
2 mistranscription of something that he said. I'd like to point  
3 those out on the record.

4 Dr. Jacoby, I put a tab on these. For easier reference, if  
5 you would look on page 73, line 22.

6 A. I believe you mean --

7 Q. Page 573. Thank you.

8 A. 573, line 22 reads, "I received an endowed share at New  
9 York University." It should read, "I received an endowed  
10 chair," c-h-a-i-r.

11 Q. And the next one is at 609, line 14.

12 MR. ORR: Your Honor, we could probably clear these up  
13 without taking up the jury's time with this.

14 THE COURT: Mr. Plevan, if they're ministerial, you  
15 can go to something else.

16 MR. PLEVAN: There's one more. This is not  
17 ministerial, your Honor.

18 Q. Page 609.

19 A. Yes.

20 Q. At line 14.

21 A. 609.

22 Q. Page 609.

23 A. It says, "Doesn't make sense," d-o-e-s-n-'-t make sense.  
24 It should be a separate sentence that reads, "Does it make  
25 sense," question mark.

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Jacoby - cross

1 Q. Where "does" and "it" are two separate words?

2 A. Correct, "does it make sense?"

3 THE COURT: So it's your testimony that your prior  
4 testimony should read on line 13, "Let's take a look first at  
5 the whole pattern of the data. Does it make sense?"

6 Is that what you're now saying?

7 THE WITNESS: Perfect, your Honor. Yes.

8 MR. PLEVAN: Nothing further, your Honor.

9 THE COURT: Cross-examine.

10 CROSS-EXAMINATION

11 BY MR. ORR:

12 Q. Good afternoon, Dr. Jacoby. My name is Dennis Orr. I  
13 don't believe we've met. I will be asking you questions on  
14 behalf of Del Monte Corp.

15 Sir, your introduction to this case came about, did it not,  
16 from Mr. Plevan, isn't that so?

17 A. Mr. Plevan and his colleagues, correct, in a phone call.

18 Q. Mr. Plevan called you in November or December of 2009 about  
19 this case, correct, sir?

20 A. Sitting here now, I don't remember the exact time. If I  
21 mentioned that in the deposition, that's about the time, yes.

22 Q. And during that conversation he asked you to work on this  
23 matter, isn't that so?

24 A. Correct.

25 Q. Now, sir, you have worked with Mr. Plevan in the past, have

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Jacoby - cross

1 you not?

2 A. Yes, I have.

3 Q. You and he have worked on many, many matters over the  
4 course of the years that you've worked together, correct, sir?

5 A. Not correct. One "many" would be sufficient. We have not  
6 worked since 2000 -- for at least ten years before he called me  
7 on this project.

8 Q. Now, sir, you have told us on Thursday that you have  
9 testified in I think you said a hundred matters in court. Do  
10 you recall that, sir?

11 A. Yes, I do.

12 Q. And you have been cross-examined many, many times, have you  
13 not?

14 A. I have.

15 THE COURT: Two many's are okay there?

16 MR. ORR: I'm sorry?

17 THE COURT: I asked whether two many's were acceptable  
18 to this witness.

19 THE WITNESS: No, your Honor. I rather enjoy it.

20 THE COURT: Go ahead.

21 Q. Now, you know, Dr. Jacoby, that I am entitled to ask you  
22 questions that permit of a yes or no answer, correct, sir?

23 A. Yes.

24 Q. And I'm going to ask you to answer my questions "yes" or  
25 "no" and if you can't, just let me know that. Do you

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Jacobby - cross

1 understand that?

2 A. I do.

3 Q. Now, let's get back to where we were. You have worked with  
4 Mr. Plevan on many matters over the years, correct?

5 A. Yes.

6 Q. In fact, sir, I understand that you have known Mr. Plevan  
7 since the early 1980's, isn't that so?

8 A. Yes.

9 Q. That's over 30 years, is it not, sir?

10 A. No, that's 30, right on the head.

11 Q. Right on the nose. Oh, since 1982, okay. Now, in addition  
12 to the cases you have worked on together, you have appeared  
13 with Mr. Plevan on panels and in seminars where you have both  
14 presented to audiences, correct, sir?

15 A. Yes.

16 Q. Now, in that first call that you had with Mr. Plevan and  
17 his colleagues, it is true, is it not, that Mr. Plevan referred  
18 to the three factors that we've been talking about in this  
19 case, correct?

20 A. Yes.

21 Q. He referred you to the thin, see-through, flexible  
22 packaging, didn't he, sir?

23 A. Yes.

24 Q. He referred you to the produce section of the supermarket,  
25 isn't that so?

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Jacoby - cross

1 A. Yes.

2 Q. And he referred you to the fact that the DMC product,  
3 products that Mr. Plevan was concerned about, were chilled,  
4 correct, sir?

5 A. Yes.

6 Q. Now, Mr. Plevan did not say to you that we want you to find  
7 out if there's confusion and we want you to find out why, did  
8 he?

9 A. I can't answer that with a yes or no. I can give you an  
10 answer to it, but not with a yes or no.

11 Q. What Mr. Plevan said to you was we think there is confusion  
12 and here's why and he gave you the three factors, correct, sir?

13 A. He asked me to find out -- I'm sorry, I can't answer that  
14 in a yes or no.

15 Q. Mr. Plevan did tell you that he thought there was  
16 confusion, correct, sir?

17 A. He told me he wanted to know if there was confusion, that  
18 their hypothesis was that there was, but they needed it tested  
19 to see if there was.

20 Q. And he gave you the three factors that we talked about,  
21 isn't that correct, sir?

22 A. That's correct.

23 Q. Now, let's talk briefly about your survey and what you did  
24 not test and then we'll talk about the survey itself. Sir, as  
25 I understand it, you conducted a survey for Mr. Plevan's

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Jacoby - cross

1 client, you tested the two red grapefruit products that we've  
2 been talking about, Exhibit 166 and 188, the fruit bowl product  
3 and the SunFresh product, correct?

4 A. Yes.

5 Q. You did not test any other Del Monte products, isn't that  
6 so?

7 A. No.

8 Q. Except for the two control products, you did not test any  
9 other Del Monte products in your survey, correct, sir?

10 A. Yes.

11 Q. You did not test the labeling of any Del Monte products,  
12 isn't that a fact?

13 A. No.

14 Q. You did not conduct in your survey any questioning with  
15 regard to the labeling of any Del Monte products, isn't that  
16 so, sir?

17 A. I didn't ask questions. The labeling was there, the  
18 consumers read them. All the labeling was intact. If they  
19 wanted to comment on labeling, if it had an effect, that would  
20 have come out, but it didn't.

21 Q. You did not conduct any questioning specifically addressing  
22 the labeling, correct, sir, in your survey?

23 A. Yes, I did. When I asked them what made you say that, if  
24 they wanted to talk about the label they could have talked  
25 about the label. That was question 2B and 2C.

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Jacoby - cross

1 Q. Now, you did not test the advertising of any Del Monte  
2 product, correct, sir?

3 A. Correct.

4 Q. And that includes the fruit undressed advertisements that  
5 we've heard discussed in the course of this case, isn't that  
6 so?

7 A. Correct.

8 Q. You did not test any products in glass jars, as I  
9 understand it, isn't that correct, sir?

10 A. Yes.

11 Q. And finally, sir, you did not obtain any data to support  
12 the proposition that consumers pay attention to the words "must  
13 be refrigerated" on a label, correct?

14 A. I did not study that, correct.

15 Q. Now, sir, let's turn to your survey. In that survey, if a  
16 respondent said that he or she thought that Del Monte foods red  
17 grapefruit product was fresh, you counted that respondent in  
18 the 31 percent that you believed may be confused by these  
19 products, correct, sir? That's a yes or no question, sir. If  
20 the person said fresh, they were counted as confused, correct?

21 A. Yes, but not in the 31 percent. That's a derived figure  
22 based upon subtracting out the control to get to the  
23 31 percent.

24 Q. You took the 51 percent and then you eliminated the  
25 20 percent who said there was fresh product in cans, correct,

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Jacoby - cross

1 sir?

2 A. Yes.

3 Q. We'll get to that shortly. Now, it did not matter what  
4 reason the respondent gave for his or her opinion that the  
5 product was fresh, correct?

6 A. Correct.

7 Q. They said fresh, mindful of the math, 51 percent minus 20,  
8 31 percent, you counted them in the ultimate 31 percent,  
9 correct, sir?

10 A. Yes.

11 Q. Now, sir, it's a fact, is it not, that 66 out of 202  
12 respondents said that the fruit bowl was fresh because it  
13 appeared that way. Do you recall that?

14 A. Yes.

15 Q. Only 13 respondents out of 407 surveyed mentioned the  
16 packaging as the reason he or she thought the product was  
17 fresh. Do you recall that, sir?

18 A. I don't recall it, but I accept the representation.

19 Q. Do you recall being asked about that at your deposition,  
20 sir? Do you recall recording it at page 28 of your report?

21 A. I don't recall. There are lots of numbers in that report,  
22 thousands of them. I don't recall all of them. I do not think  
23 you would be misrepresenting to me. I accept what you're  
24 saying, but if you ask me do I recall them, the answer is no, I  
25 don't.



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Jacoby - cross

1 Q. Now, the packaging, the thin, see-through, flexible  
2 packaging was one of the reasons that your colleague,  
3 Mr. Plevan, mentioned to you in that first call you had in this  
4 case, correct, sir?

5 A. Correct.

6 Q. Recall on Thursday, Dr. Jacoby, you told us that the  
7 31 percent was a humongous number. Do you remember saying that  
8 in your testimony on Thursday?

9 A. I know it was large. I don't know if I used the word  
10 "humongous," but it is relative to my experience in other  
11 matters.

12 Q. 13 respondents out of 407, sir, is 3 percent. You agree  
13 with that mathematics, do you not, sir?

14 A. Roughly, yes.

15 Q. 3 percent is not a humongous percentage, is it, sir?

16 A. Correct.

17 Q. Now, sir, only 5, 5 respondents out of 407 mentioned  
18 location of the product in the produce section of the store as  
19 the reason he or she thought the product was fresh. Do you  
20 recall that?

21 A. Roughly that number, yes.

22 Q. Now, location is another reason your friend, Mr. Plevan,  
23 offered to you in the first conversation you had in this case,  
24 correct, sir?

25 A. Yes.

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Jacoby - cross

1 Q. Five out of 407, sir, is 1 percent, is it not?

2 A. A little over. 1 point something, but let's not quibble.

3 Q. You'll forgive me if I move it down to 1 percent, would you  
4 not, Dr. Jacoby?

5 A. You may round down.

6 Q. And it's not a humongous percent, is it?

7 A. Correct.

8 Q. Now, 8 out of 407 of the respondents mentioned  
9 refrigeration as the reason he or she thought the products were  
10 fresh isn't that correct?

11 A. I accept that representation.

12 Q. And that's the third factor Mr. Plevan raised in the first  
13 conversation that you had in this case, isn't that so?

14 A. Yes.

15 Q. Eight out of 407, sir, is 2 percent, is it not?

16 A. Approximately.

17 Q. Not a statistically significant number, is it sir?

18 A. Correct.

19 Q. And you told us today -- you told us at our deposition, and  
20 just to clarify, I did not take your deposition?

21 A. Correct.

22 Q. But you told us today, sir, that the reasons that  
23 respondents gave for why they thought the product was fresh  
24 were irrelevant to you. Do you recall that?

25 A. Yes, they are irrelevant in the context of an experiment --

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Jacoby - cross

1 Q. Sir, I ask you to answer "yes" or "no."

2 A. Yes.

3 Q. Do you recall saying that?

4 A. I believe I did. Sorry, that's not a yes. Yes.

5 Q. You disregarded the reasons that your respondents gave you  
6 as to why they thought the product was fresh, correct, sir?

7 A. Yes.

8 Q. Now, sir, you agree that Thomas McCarthy's treatise,  
9 McCarthy on Trademarks and Unfair Competition is a reliable  
10 authority in the field of trademarks and competition, correct,  
11 sir?

12 A. Tom's book is a reliable legal authority, not a science.

13 MR. ORR: Your Honor, under 803.18 I am allowed to  
14 publish portions of Mr. McCarthy's treatise to the jury.

15 MR. PLEVAN: Objection, your Honor.

16 MR. ORR: It is considered evidence, but it's not  
17 given an exhibit number. That's Federal Rule of evidence  
18 803.18, your Honor.

19 THE COURT: Sidebar.

20 (Continued on next page)

21

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23

24

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Jacoby - cross

1 (At the side bar)

2 THE COURT: What's the objection?

3 MR. PLEVAN: Your Honor, Professor McCarthy's book is  
4 a treatise on law and what cases say.

5 THE COURT: What were you going to ask him about from  
6 McCarthy?

7 MR. ORR: I'll show you the portions, your Honor. I  
8 have excerpts that actually I should have brought up.

9 THE COURT: Why don't you do that?

10 MR. ORR: I can show you mine. I'm sorry, Judge, but  
11 the first reading would be from there. Actually, I have copies  
12 for you.

13 THE COURT: "Sometimes the most probative and  
14 illuminating parts of the survey are not the numbers and  
15 percentages generated by the responses but the verbatim  
16 accounts of the responses. The respondents' verbatim responses  
17 to why questions may provide a window into consumer thought  
18 processes in a way that mere statistical data cannot."

19 MR. PLEVAN: It may be yes, may be no, but this is  
20 just simply a lawyer writing a book about what courts have  
21 said. There are certain cases where judges have said that, in  
22 other cases judges have not. Your Honor is the only person who  
23 can give them law on this case.

24 THE COURT: Are you presenting this as something a  
25 court has said?

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Jacoby - cross

1 MR. ORR: No.

2 THE COURT: You're presenting it as something that's  
3 contained in a learned treatise?

4 MR. ORR: Absolutely, judge.

5 THE COURT: Is that your statement of it or is that  
6 the treatise you just showed?

7 MR. ORR: That is the treatise itself, your Honor.  
8 Your Honor, might I add that Dr. Jacoby refers to  
9 Mr. McCarthy's treatise in his CV, which is in evidence.

10 THE COURT: He's already said, I think he said --

11 MR. ORR: I think so, too.

12 THE COURT: -- that it's a reliable source. I believe  
13 he said that.

14 MR. PLEVAN: Judge, it's simply what some courts have  
15 said on some circumstances which we will not know. This is not  
16 a treatise by an expert in this field. This is a lawyer. He's  
17 writing a treatise. We all use McCarthy to look up the law.

18 THE COURT: Let's see that again. I don't believe  
19 it's presented as a statement of a Court.

20 MR. ORR: It is not.

21 MR. PLEVAN: What is it now?

22 MR. ORR: Section 32.178 of McCarthy's treatise, your  
23 Honor, verbatim.

24 THE COURT: Do you have the earlier page?

25 MR. ORR: Yes, sir.

C42FFRE2

Jacoby - cross

1 THE COURT: This is the treatise you're showing me?

2 MR. ORR: This is the treatise.

3 THE COURT: No, I'm going to allow that. This is not  
4 what the Court has said. This is the author's opinion. This  
5 is what somebody who he said, I believe, is a reliable source  
6 in the field. I'm going to allow it. All right, let's move  
7 on.

8 (Continued next page)

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C42Wfre3

Jacoby - cross

1 (In open court)

2 MR. ORR: Your Honor, I'd like to publish to the jury  
3 McCarthy's treatise Section 32:178.

4 THE COURT: Do it in the context of calling his  
5 attention to it, sir.

6 MR. ORR: I certainly will, your Honor.

7 Q. Dr. Jacoby, I think you've indicated to us that you're  
8 familiar with Mr. McCarthy's treatise on trademarks and unfair  
9 competition, are you not?

10 A. I am.

11 Q. Let me ask you to look at Section 32:178 of that treatise,  
12 which is on the board, on the screen before us, and I'm going  
13 to direct your attention specifically, sir, to the next page,  
14 where it says "author's opinion."

15 MR. ORR: Can everyone see that I know we've been  
16 reading to the jury things that the jury can read for itself,  
17 but this might be easier for me to also read. "Sometimes, the  
18 most illuminating and probative parts of the survey are not the  
19 numbers and percentages generated by the responses but the  
20 verbatim accounts of the responses."

21 Q. Do you see that, sir?

22 A. I do.

23 Q. Now, sir, you've told us that you did not consider the  
24 verbatim responses of the respondents to your survey to be  
25 relevant, did you? You disregarded them, correct?

C42Wfire3

Jacobby - cross

1 A. After examining them to look for outliers, yes, I  
2 disregarded them because there is --

3 MR. ORR: Your Honor.

4 A. -- cost instead of --

5 THE COURT: Just a moment. Sir, when Mr. Orr asks you  
6 a question, you should answer it yes or no, if you can. But if  
7 you can't answer it yes or no without being misleading, you  
8 should tell him that and he then will have the option of asking  
9 the question or of going on. Can you answer that question yes  
10 or no?

11 THE WITNESS: Not without being misleading, your  
12 Honor.

13 THE COURT: All right. Sir.

14 BY MR. ORR:

15 Q. All right. Sir, have you considered the reasons given by  
16 the respondents to your survey to be irrelevant, correct, sir?  
17 Yes or no?

18 A. To that question, the answer was no for reasons I mentioned  
19 in court. And just mentioned again.

20 THE WITNESS: Your Honor, I took an oath to tell the  
21 whole truth, nothing but the truth. This is not the whole  
22 truth.

23 MR. ORR: Your Honor --

24 THE COURT: Just answer the questions.

25 The jury will disregard the statement of the witness



C42Wfire3

Jacoby - cross

1 because there was no question that it was attached to.

2 BY MR. ORR:

3 Q. Do you recall telling the examiner at your deposition, sir,  
4 at page 101, that you considered the reasons given by the  
5 respondents to your survey to be irrelevant?

6 A. Yes. After examining them for the outliers, the aberrant  
7 responses, as I mentioned.

8 Q. Now, sir, in response to your survey, far more respondents  
9 mentioned the appearance of the products, did they not, than  
10 those that mentioned the reasons given to you by your friend,  
11 Mr. Plevan, in your first conversation in this case, correct?

12 A. For the reasons I indicated, the answer is correct. And  
13 when I say --

14 Q. Now, let me turn your attention, sir, to another portion of  
15 Mr. McCarthy's treatise.

16 MR. ORR: I hope everybody can see that, but I'm  
17 interested in the last sentence.

18 MR. PLEVAN: Objection, your Honor.

19 THE COURT: Yes. The jury will disregard --

20 Is it to the question that's coming or to the  
21 statement on the screen?

22 MR. PLEVAN: To this going up on the board with the  
23 footnotes.

24 THE COURT: Take it down.

25 MR. ORR: I'll read it to the witness, your Honor.

C42Wfre3

Jacoby - cross

1 MR. PLEVAN: Objection.

2 MR. ORR: If I may.

3 THE COURT: Let me take a look at it.

4 (Discussion off the record; at the side bar)

5 THE COURT: You may ask the question.

6 BY MR. ORR:

7 Q. Dr. Jacoby, you're aware that Mr. McCarthy, in his  
8 treatise, states, "Like any scientific method related to  
9 statistics in the social science, every survey, no matter how  
10 carefully constructed and conducted, has some potential flaws  
11 somewhere." You recall Mr. McCarthy saying that in his  
12 treatise, do you not, sir?

13 A. Yes.

14 Q. And you agree with that statement, do you not, sir?

15 A. I, yes.

16 Q. Now, mindful that every survey has potential flaws, it is a  
17 fact, is it not, sir, that all the decisions about who to  
18 include in this survey, how many men versus women, the age of  
19 the respondents, were your personal choices, correct, sir?

20 A. Based upon informed data, yes.

21 Q. Well, you did not conduct any scientific testing to  
22 determine who to include as respondents in the survey; you just  
23 made some choices, correct, sir?

24 A. As I said during my direct --

25 Q. Yes or no, sir? You made some choices, correct?

C42Wfire3

Jacoby - cross

1 A. Yes, I chose men and women. I chose --

2 MR. ORR: Your Honor.

3 THE COURT: The answer is yes.

4 THE WITNESS: Yes.

5 BY MR. ORR:

6 Q. Now, sir, we talked about the 64-ounce Sunfresh product  
7 that you tested, Exhibit 188 before you. You tested that  
8 product, sir, as if it sold in supermarkets, did you not?

9 A. Yes, I put it on a shelf in the supermarket.

10 MR. ORR: Your Honor --

11 Q. The answer's yes, sir?

12 A. Yes, I put it on a shelf in the supermarket.

13 Q. You showed, in fact, respondents of a video of a  
14 supermarket, correct?

15 A. Correct.

16 Q. Now, you eventually came to understand after you conducted  
17 the survey that the Sunfresh 64-ounce product is not sold in  
18 supermarkets, is it?

19 A. No. Incorrect. I knew that before I did that.

20 Q. You didn't tell us that at your deposition, do you recall  
21 that, sir?

22 A. I don't recall what you asked, but I knew that this was not  
23 being sold in supermarkets at the time I designed my survey.

24 Q. So even though the 64-ounce Sunfresh product is not sold in  
25 supermarkets, you tested it in the supermarket, correct, sir?

C42Wfire3

Jacoby - cross

1 A. Sold to consumers, yes.

2 Q. Yes or no, sir?

3 A. Yes.

4 Q. That product is sold at giant discount stores like Costco  
5 and Wal-Mart, correct?

6 A. I said that 20 minutes ago. Correct.

7 Q. And those giant discount stores, sir, are a very different  
8 environment, are they not, than the local supermarket or bodega  
9 or small grocery store? Correct?

10 A. Every supermarket is different from each other.

11 Q. Yes or no, sir?

12 A. Sure, yes.

13 Q. Is that a different environment?

14 A. Yes.

15 Q. By the way, sir, on the videos that we saw on Thursday,  
16 those products weren't, you didn't walk into a supermarket just  
17 randomly and take a video; you actually set up the products on  
18 the shelf that we saw in the video, correct, sir?

19 A. Yes.

20 Q. Now, sir, again, mindful that every survey has flaws --

21 A. Potential flaws.

22 Q. Potential flaws.

23 -- potential flaws, you agree, sir, that it is important, do  
24 you not, to be precise in the framing of a question to a  
25 respondent in one of your survey, correct?

C42Wfre3

Jacoby - cross

1 A. Correct.

2 Q. You also agree that different consumers can have different  
3 understandings of the meaning of the same word, isn't that  
4 correct?

5 A. Correct.

6 Q. In fact, sir, you have been criticized by one of Judge  
7 Stein's colleagues in this court on another case for having  
8 failed to define a significant term in one of your survey, have  
9 you not?

10 MR. PLEVAN: Objection, your Honor.

11 MR. ORR: It's cross-examination, your Honor.

12 THE COURT: Just a moment. Were you criticized in  
13 another case by the judge for having failed to define a  
14 significant term in whatever survey was involved in that other  
15 action?

16 THE WITNESS: I have no idea what the cross-examiner  
17 is referring to.

18 THE COURT: All right. So the answer is I don't know  
19 what you're referring to.

20 MR. ORR: Your Honor, may I approach with a booklet of  
21 materials.

22 THE COURT: You can show him whatever you want.

23 MR. ORR: Your Honor, may I approach. I have one for  
24 your Honor as well.

25 THE COURT: Yes.

C42Wfre3

Jacoby - cross

1 MR. PLEVAN: Judge, I'll object to this line using  
2 other cases that have different kinds of surveys.

3 MR. ORR: I find that ironic.

4 THE COURT: Gentlemen, this is cross-examination. Go  
5 ahead.

6 I'm sorry. It's redirect. What tab do you want him  
7 to look at?

8 MR. ORR: I would like you to look at tab one, please,  
9 sir.

10 THE COURT: Just take a look at that to yourself, sir.  
11 Does that refresh your recollection in regard to whether or not  
12 you were criticized in another case for failing to define is  
13 significant term in some other survey?

14 THE WITNESS: It does, your Honor. It was the word  
15 "version."

16 THE COURT: It does or does not?

17 THE WITNESS: It does.

18 THE COURT: What is your refreshed recollection?

19 THE WITNESS: It was with regard to the word  
20 "version."

21 THE COURT: All right.

22 BY MR. ORR:

23 Q. And the judge in that case was Judge Sand, correct?

24 A. Correct.

25 Q. And Judge Sand indicated on page ten of his opinion, "But

C42Wfire3

Jacoby - cross

1 the Jacoby survey never defined the word version or elicited  
2 the word version from the survey respondents." Do you see  
3 that, sir?

4 A. I haven't gotten there yet, but.

5 Q. Turn to page ten.

6 A. Yes, I see it.

7 Q. First full paragraph.

8 A. I see it.

9 Q. Judge Sand indicated that you never defined the word  
10 "version"?

11 MR. ORR: At the end of that paragraph.

12 MR. DREYER: If he could read the whole sentence.

13 THE COURT: Let's just questions and have the answers.

14 BY MR. ORR:

15 Q. But the Jacoby survey never defined the word "version" or  
16 elicited the word "version" from the survey respondents, do you  
17 see where Judge Sand said that?

18 A. I do.

19 Q. At the bottom of that paragraph, Judge Sand continued,  
20 "Because of the ambiguity of the version question, the court  
21 assigns significantly reduced weight to the Jacoby survey's  
22 results." Do you see that, sir?

23 A. I do.

24 Q. Now, sir, the word "fresh" was used in your survey in this  
25 case, correct?

C42Wfre3

Jacobson - cross

1 A. Yes.

2 Q. It is an important word in this case, is it not?

3 A. It is.

4 Q. I think we've heard you say earlier, but let's just  
5 confirm, you did not define the word "fresh" in your survey,  
6 correct, sir?

7 A. Correct.

8 Q. Now, you felt, and I think you told us this this morning,  
9 you felt the word "fresh" and the word "preserved" defined each  
10 other, correct?

11 A. In context, correct.

12 Q. So if the respondent did not think the product was  
13 preserved, the respondent would think the product was fresh,  
14 correct?

15 A. Correct. Or --

16 Q. And vice versa? If the respondent thought that the product  
17 contained preservatives, the respondent would consider the  
18 product not fresh, correct?

19 THE WITNESS: Your Honor, I can't answer that without  
20 explaining.

21 THE COURT: All right. Now Mr. Orr will have that  
22 choice.

23 BY MR. ORR:

24 Q. You certainly understand, sir, that the word "fresh" can  
25 have different meanings, do you not?



C42Wfre3

Jacoby - cross

1 A. Yes, I do.

2 Q. A check, sir, of dictionary.com showed 17 meanings to the  
3 word "fresh". Does that come as a surprise to you?

4 A. No.

5 THE COURT: The witness has set forth in direct  
6 testimony a couple of the different meanings fresh had. I  
7 think he referred to his 11-year-old daughter who was not  
8 fresh, is that correct?

9 THE WITNESS: That's correct, your Honor.

10 MR. ORR: We're going to keep that out of this.

11 Q. Newly made or obtained, would that be a meaning you've  
12 heard used for the word "fresh"?

13 A. Could be, yes.

14 Q. Recently arrived?

15 A. Sure.

16 Q. Fresh troops?

17 A. Yes.

18 Q. And I think we talked, you talked about this earlier on  
19 direct examination, retaining the original properties  
20 unimpaired, not stale or spoiled. You're certainly familiar  
21 with that definition, are you not, sir?

22 A. Yes.

23 Q. And I think this is the meaning you intended in your  
24 survey, but correct me if I am wrong, not preserved by  
25 freezing, canning, pickling, salting, drying, etc.?

C42Wfire3

Jacobby - cross

1 A. Correct.

2 Q. You've heard that?

3 A. That's the opposite, correct.

4 Q. Now, you do agree that the word "fresh" can simply mean  
5 unspoiled, not stale, correct?

6 A. Correct.

7 Q. Indeed, sir, it is a fact, isn't it, that many of the  
8 respondents seemed to have that meaning in mind when they  
9 answered the questions in your survey, isn't that correct?

10 A. I don't think so.

11 Q. Well, sir, do you have your report handy?

12 A. Yes, I do.

13 Q. Turn to page 294. Respondent 1826 said I say fresh fruit  
14 because the fruit doesn't look old or not tasty. Do you see  
15 that, sir?

16 A. I do.

17 Q. Turn to page 302 -- all right, at page 302, respondent  
18 10633 said, The fruit looks fresh because it's in good shape  
19 and not aging or withered. Do you see that, sir?

20 A. No, I don't. I don't have a 10633 here.

21 MR. PLEVAN: Neither do I.

22 A. Page 302 you said?

23 Q. 302. I don't have -- what is that number again?

24 MR. PLEVAN: What was the number again?

25 MR. ORR: 302.

C42Wfire3

Jacoby - cross

1 MR. PLEVAN: No, no. The number of the respondent.

2 BY MR. ORR:

3 Q. Page 302 of your report, sir, respondent 10633, in the  
4 right-hand column?

5 A. I have no 10633 on this page.

6 MR. PLEVAN: Neither do I.

7 MR. ORR: I do.

8 THE COURT: Why don't we take a break. It's 1:00.  
9 Mr. Orr, is this a logical time to straighten it out?

10 MR. ORR: Perfect time.

11 THE COURT: Ladies and gentlemen, we'll take a lunch  
12 break. See you back here at ten after two. Thank you.

13 (Jury excused)

14 THE COURT: Please be seated. You may step down,  
15 Dr. Jacoby.

16 (Witness excused)

17 THE COURT: So the record is complete, when we had the  
18 side bar earlier without the reporter present, Mr. Plevan made  
19 the same objection to the McCarthy treatise and my ruling is  
20 the same. I overrule the objection. I leave it to you  
21 gentlemen to straighten out where that reference can be found.  
22 But what exhibit number is the McCarthy report? I have the  
23 appendices here as in 119. What number is the report itself?

24 MR. ORR: I don't believe the report was entered into  
25 evidence, your Honor, which has been a little bit of, unless

C42Wfire3

Jacoby - cross

1 somebody moved it when I wasn't here.

2 THE COURT: Do we have somewhere in these materials  
3 the McCarthy report?

4 MR. ORR: You mean the Jacoby report?

5 THE COURT: I'm sorry. The Jacoby report.

6 MR. DREYER: I think we agreed the reports could --

7 THE COURT: I'd be very surprised if it was in  
8 evidence. I really was asking if this had been given to me in  
9 any of these books.

10 MR. DREYER: I don't believe either side has.

11 THE COURT: Fine. Let me ask, sir.

12 MR. ORR: For the record, your Honor, I was referring  
13 to appendix H which is marked for identification as Exhibit  
14 133, and that's page 302 and I believe that's where they'll  
15 find the information I was just referring to. If counsel has  
16 any problem with that, we can chat.

17 THE COURT: Just walk over to Dr. Jacoby's friend  
18 Mr. Plevan and ask him.

19 MR. PLEVAN: Three times, so far, my good friend, my  
20 best friend. I'm expecting Dr. Jacoby to take me out for  
21 drinks.

22 THE COURT: Are you all on the same page?

23 How much longer do you think, as an estimate, sir?

24 MR. ORR: Half hour, Judge.

25 THE COURT: All right. I have two questions that I

C42Wfre3

Jacoby - cross

1 just need some assistance on in terms of the charge, two very  
2 brief questions. I don't know who is going to be doing the  
3 charge issues, but if you have those in front of you, the  
4 proposed Fresh charge -- you both had it actually. On enhanced  
5 damages for the Lanham Act, you both seem to say the jury can  
6 treble. That I don't understand in light of the Getty  
7 decision, which says whereas here the recovery is based on  
8 plaintiff's damages, the Court, not the jury may enhance the  
9 award up to three times the amount of actual damages.

10 So what am I missing here? You both seem to put  
11 trebling in the jury's hands. I don't understand that.

12 MR. PLEVAN: Your Honor, you're absolutely right that  
13 that's what the Second Circuit law is. The question is whether  
14 or not, and we cited this in one of the lengthy footnotes --

15 THE COURT: You're talking about the copyright case by  
16 the Supreme Court?

17 MR. PLEVAN: Yes, sir.

18 THE COURT: What in the world does that have to do  
19 with the Getty case?

20 MR. PLEVAN: Because the Supreme Court said the  
21 statutory damages, contrary to prior case law, was triable to  
22 the jury.

23 THE COURT: In the copyright decision.

24 MR. PLEVAN: Yes, absolutely, your Honor. So the  
25 suggestion we're making is would the Second Circuit come out

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Jacoby - cross

1 the same way in light of that Supreme Court's case which I  
2 believe was a little bit of a surprise that statutory damages  
3 was triable to the jury. But your Honor is absolutely right  
4 about the current state of the Second Circuit law.

5 THE COURT: What you're asking me to do is to give a  
6 charge that's flatly inconsistent with the stated Second  
7 Circuit law in Getty, in light of a later Supreme Court case on  
8 a different statute that may or may not be applicable.

9 MR. PLEVAN: Absolutely right, your Honor.

10 THE COURT: DMC, you want the same charge?

11 MS. DeARCY: No, your Honor. And particularly in  
12 light of what you've just identified.

13 THE COURT: I'm raising the question. I didn't  
14 understand why both parties, I thought in your charge you were  
15 saying it.

16 MS. DeARCY: Your Honor, again, particularly in light  
17 of the inconsistencies you've identified.

18 THE COURT: In light of?

19 MS. DeARCY: The inconsistencies taken with respect to  
20 the Second Circuit, the defendants would withdraw that  
21 instruction from the enhanced damages.

22 MR. PLEVAN: Your Honor, we were merely flagging this  
23 issue because sometimes judges say take an issue that there may  
24 be some question, give it to the jury, it could always be  
25 redetermined by the judge later, then you have a verdict. We were

C42Wfre3

Jacoby - cross

1 certainly not trying to mislead because I think we made it  
2 clear that the current law is exactly what your Honor said.

3 THE COURT: If there is a serious question, I could  
4 always do that and then take it away from the jury. DMC.

5 MS. DeARCY: I think actually that would create a  
6 greater confusion. I think as Fresh has identified the law in  
7 the Second Circuit, it's inconsistent with the instruction that  
8 the best and most prudent way to proceed, your Honor, would be  
9 to remove that language from the instruction altogether.

10 THE COURT: Let me think about it. When I give you  
11 the charge, we can talk about this at the charging conference.

12 The second area of question that I have is where  
13 Fresh, and I don't have the specific part in front of me,  
14 Fresh's charge on damages, Fresh is separating out the damages,  
15 I mean, telling the jury to separate them out and not to double  
16 count, correct? You're trying to prevent double counting by  
17 the jury of damages?

18 MR. DREYER: That is correct, your Honor.

19 THE COURT: My question to DMC is I don't think that's  
20 really what the current cases say, but isn't that a better way  
21 to go about it -- that is, if there's agreement -- to go about  
22 it because then we're guaranteed not to have double counting,  
23 which I may have to take account of later on if I use DMC's  
24 charge on damages?

25 MS. DeARCY: Your Honor, our problem with the way in

C42Wfire3

Jacoby - cross

1 which they articulated this double counting issue is they  
2 suggest to the jury in their instruction that if there is a  
3 problem with double counting that the Court will correct that  
4 later. We certainly don't want to tell the jury that they  
5 don't have to pay attention to the damages in a careful way  
6 because you're going to correct them.

7 THE COURT: That's a good point. But if that part of  
8 it is taken out, then you don't have a problem, in general, and  
9 again, I'll give you the charge which everybody can nitpick;  
10 I'm just trying to get a sense of where we're going. You  
11 wouldn't have an objection if I take account of your concern?

12 MS. DeARCY: Your Honor, we wouldn't have a concern  
13 with the Court identifying the issue of double counting. I'm  
14 not certain if your question is whether we have any other  
15 objections to their damages instruct.

16 THE COURT: No. I think you do. That helps.

17 When does Fresh, given the estimate by Mr. Orr, when  
18 does Fresh think it's going to close?

19 MR. DREYER: Rest?

20 THE COURT: Rest.

21 MR. DREYER: Our next and last witness is Mr. Phillips  
22 who will be available first thing in the morning given the  
23 calculation issue, and I think we had agreed to have Del Monte  
24 call one of their witnesses out of turn, Mr. Lazopoulos, who  
25 was here last week, and he'll be available.



C42Wfire3

Jacoby - cross

1 THE COURT: I think we'll have both sides resting  
2 today or tomorrow, Mr. Gonzalez?

3 MR. GONZALEZ: Yes, your Honor.

4 THE COURT: We'll be aiming for a charging conference  
5 at the end of the day tomorrow, I think that makes sense.

6 MR. GONZALEZ: Your Honor, I don't think this will be  
7 a problem, Lazopoulos will be here today is fine, but I'm told  
8 he may not be able to be here past today. I don't know how  
9 long they're going to take on redirect of Mr. Jacoby.

10 MR. PLEVAN: Ten, 15 minutes, Judge.

11 THE COURT: Ten after two, take a lunch break.

12 (Luncheon recess)

13  
14 AFTERNOON SESSION

15 2:10 p.m.

16 (In open court; jury not present)

17 THE COURT: I'll get the charge to the parties as soon  
18 as I can. We'll e-mail it to whoever you tell us to e-mail it  
19 to. Make sure my deputy has e-mails. I hope to have it out to  
20 you by six or seven p.m. And assuming we end up everybody  
21 closing tomorrow, we'll have the charging conference after  
22 everybody has closed or at the end of the day. If we haven't  
23 closed, we'll have it by five p.m.

24 Mr. Plevan, you look a little quizzical.

25 MR. PLEVAN: Rested, not closed, Judge.

C42Wfire3

Jacoby - cross

THE COURT: Thank you. Rested, not closed.

(Continued on next page)

C42Wfire3

Jacoby - cross

1 (In open court; jury present)

2 THE COURT: Be seated.

3 You may continue with the cross-examination of  
4 Dr. Jacoby, Mr. Orr.

5 MR. ORR: Thank you, your Honor.

6 BY MR. ORR:

7 Q. Doctor Jacoby, before lunch we were talking about the  
8 meaning of fresh, do you recall that.

9 A. Yes.

10 Q. We were talking about the particular meaning not stale, do  
11 you recall that?

12 A. Yes.

13 Q. We were then talking about some of the verbatim responses  
14 that were generated by respondents to your survey, do you  
15 recall that again, sir?

16 A. Yes.

17 MR. ORR: Your Honor, we offer into evidence Exhibit  
18 133, which is appendix H to Dr. Jacoby's report, which is the  
19 verbatim responses.

20 THE COURT: Any objection?

21 MR. PLEVAN: No objection, your Honor.

22 THE COURT: Admitted without objection.

23 (Defendants' Exhibit 133 received in evidence)

24 BY MR. ORR:

25 Q. Now, the proposition I put before you, Dr. Jacoby, to start

C42Wfre3

Jacoby - cross

1 this was that many of the respondents seemed to have the  
2 meaning in mind of the word "fresh" as not stale when they  
3 responded to questions in your survey, isn't that so?

4 A. It is so that that's what you proposed. It is not so that  
5 I agree.

6 Q. I know you don't agree. That was the proposition I put to  
7 you.

8 A. Yes.

9 Q. All right. Let's turn to appendix H, Exhibit 133 in  
10 evidence. Let's look at page 294 and let's look at the  
11 response of respondent 1826. Respondent 1826 certainly seemed  
12 to interpret the word "fresh" to mean not stale, isn't that so,  
13 Doctor?

14 A. Correct.

15 Q. Let's turn to appendix H, sir, 133 in evidence, at page  
16 302, and let's look at respondent 10633.

17 A. There is no 10633 as I told you before when you got to this  
18 point.

19 Q. Up on the screen, sir, unless I'm misstating it, isn't that  
20 10633?

21 A. That is on the screen, but it's not on page 302. I don't  
22 know where you are.

23 Q. Well, I have appendix --

24 THE COURT: Why don't you go to what he has in front  
25 of him and show him where you are.

C42Wfire3

Jacoby - cross

1 MR. ORR: I don't know.

2 Q. This is your report, sir?

3 A. It is.

4 MR. ORR: May I ask questions from here, your Honor.

5 THE COURT: Yes, of course.

6 BY MR. ORR:

7 Q. This is the report you brought with you today, is that  
8 correct?

9 A. Correct.

10 Q. This document is appendix H which the parties have put  
11 together?

12 A. That's appendix H that you're looking at in the report.  
13 That's what it says.

14 THE COURT: Why don't counsel just talk to each other  
15 and see if you can straighten it out, gentlemen.

16 BY MR. ORR:

17 Q. It's on 301 on the one you have, sir.

18 A. I don't have it.

19 Q. Which you don't have because I have it.

20 A. Correct.

21 Q. And I'm returning it to you. I knew we'd find it  
22 eventually.

23 MR. ORR: Thank you, Mr. Plevan.

24 Q. Now, sir, on 301, before you, for some reason it's 302 on  
25 the screen before the jury, we finally at long last see

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Jacoby - cross

1 respondent 10633's response, don't we?

2 A. Yes.

3 MR. ORR: And if we could show the response in the  
4 other column, Andrew, please. Can everyone see that?

5 Can you see it, your Honor?

6 THE COURT: Yes.

7 BY MR. ORR:

8 Q. Respondent 10633 apparently interpreted the word "fresh" to  
9 mean not stale, correct, Dr. Jacoby?

10 A. That's a meaning, yes.

11 MR. ORR: Let's look at, I do this with great  
12 trepidation, your Honor, page 289, and let's look at respondent  
13 6106. And I'm breathing a heavy sigh of relief here, your  
14 Honor.

15 Q. Once again, we see another respondent who seemed to  
16 interpret the word "fresh" to mean not stale, correct, sir?

17 A. You're referring to 6106.

18 Q. Yes, sir.

19 A. Looking at the texture, looking at it, it looks fresh, you  
20 can tell it wasn't falling apart and it was firm.

21 Q. Once again, this is a respondent who seems to be  
22 interpreting the word "fresh" to mean not stale, correct, sir?

23 A. You could interpret it that way.

24 Q. Let's look at page 294, respondent 4941. This respondent,  
25 Dr. Jacoby, interpreted fresh and preserved in responding to

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Jacoby - cross

1 your survey, correct, sir?

2 A. In response to question 2A, they said fresh.

3 Q. And in their verbatim response, they said it looked fresh  
4 but could be considered preserved, correct, sir?

5 A. Correct.

6 Q. Let's look at page 286 of the verbatims in Exhibit 133.

7 MR. ORR: I'm having trouble reading that myself.

8 Q. Once again here, sir, we have another respondent who  
9 appears to be interpreting the word "fresh" to mean not stale,  
10 correct?

11 A. No, I don't see that here.

12 Q. Let's turn back to the last one, page 294, 4941. This  
13 person used the terms "fresh" and "preserved" in the same  
14 verbatim answer, correct, sir?

15 A. Yes.

16 Q. And it is a fact, is it not, that you did not review the  
17 verbatims to determine if respondents were defining the term  
18 "fresh" to mean not stale, correct?

19 A. Not correct.

20 Q. You did not in your report at any time anywhere, sir, that  
21 you reviewed the verbatims to determine if respondents were  
22 using the term "fresh" to mean not stale, isn't that so?

23 A. I didn't state that in the report, that is correct.

24 Q. In fact, sir, 42 respondents in your survey, when they were  
25 shown a can of fruit, indicated that they thought the fruit

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Jacoby - cross

1 inside was fresh, correct?

2 A. Correct.

3 Q. Now, that's 20.7 percent of the people surveyed about the  
4 can, correct, sir?

5 A. Correct.

6 Q. Now, in fact, the products that you tested are preserved,  
7 are they not?

8 A. All of the products are, yes.

9 Q. And they say so on their labels, don't they?

10 A. I don't know if they do or not.

11 Q. Well, Exhibits 166 and 186 are the Red Grapefruit Bowl and  
12 the Sunfresh bowl. The labels say they each contain  
13 preservatives, do they not, sir?

14 A. If you give me an opportunity to read them, I'll answer  
15 your question.

16 Q. Let's move along. The jury has those in front of them.  
17 They can make their determination.

18 You talked in your direct examination about the Hall &  
19 Partners study. Do you recall that?

20 A. Yes.

21 Q. And that study was done in October of 2008, was it not,  
22 sir?

23 A. I think so.

24 Q. And as I understand it, sir, it was a 25-minute online  
25 survey, correct?



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Jacobby - cross

1 A. Approximately, that's my understanding.

2 Q. And what happened was respondents would respond to a spam  
3 request out over the Internet, and if they wished, they could  
4 participate in this survey, correct, sir?

5 A. I don't recall that part. It may be so, but I don't recall  
6 it.

7 Q. Now, sir, in that study, the Hall & Partners folks who  
8 conducted it did not define the word "fresh" any better than  
9 you did, did they?

10 A. They did not define fresh.

11 Q. Now, sir, in your survey, the product that was being tested  
12 was taken away from the respondents before they answered the  
13 questions that you posed to them, correct, sir?

14 A. Correct.

15 Q. And you believed that it was more realistic for a  
16 respondent to have the product taken away before they decided  
17 answers to your questions than it would be if they held the  
18 product in their hands while they responded, correct?

19 A. Correct, with the interviewer there. Correct.

20 Q. And, of course, in a supermarket or a bodega or a Costco or  
21 anywhere else, they would have the product in their hands,  
22 correct, sir?

23 A. And they wouldn't have an interviewer, correct.

24 Q. Now, sir, at your deposition, you testified that you have  
25 been criticized by a court for allowing respondents in the

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Jacoby - cross

1 survey done in that case to have in hand the Yellow Page  
2 advertising that was at issue in that case. Do you recall  
3 giving that testimony, sir?

4 A. Yes.

5 Q. And you referred to the Quality Inn's International case  
6 versus McDonald's?

7 A. Correct.

8 Q. The fact is that Court did not criticize you for that  
9 reason, isn't that correct, so?

10 A. That's, what, 15, 20 years ago, I would have to go back and  
11 review it, but I believe I was criticized for leaving it there  
12 while asking the questions.

13 Q. Let's turn to tab two of the booklet I gave you earlier.  
14 Do you recall, sir, that the Quality Inns v. McDonald's case  
15 occurred in Maryland, Baltimore, Maryland?

16 A. Yes, I can see here it did 24 years ago.

17 Q. All right. Let's turn, sir, to page 17 in tab two of the  
18 booklet I provided to you. And on page 17, at the bottom of  
19 the first column, you'll see the judge says as follows:

20 "Dr. Jacoby conducted his own survey using as stimuli an  
21 airline travel magazine advertisement for Quality  
22 International, a mock-up Yellow Pages advertisement, and an  
23 artist's rendering showing McSleep Inn with a clarifying sign  
24 underneath it which reads 'by Quality International.'" Do you  
25 see where I'm referring, sir?

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Jacoby - cross

1 A. I do.

2 Q. And the court goes on to say, in the second paragraph  
3 following, "The court accepts that data, however, with some  
4 reservations in view of the inclusion of the sign by Quality  
5 International prominently added under McSleep in logo." Do you  
6 see that, sir?

7 A. I do.

8 Q. So the court didn't criticize you for allowing the  
9 respondents to have it in hand; the court criticized you for  
10 changing the trademark that was being tested, correct, sir?

11 A. Incorrect. There were three studies. The court is  
12 commenting on one of the three studies with one of the three  
13 stimuli. It was in regard to the Yellow Pages stimulus that  
14 the court criticized me for leaving it in front of the  
15 respondents.

16 Q. There is no written reference to that in this opinion, sir.  
17 If you wish to take some time to review it, go right ahead.

18 MR. PLEVAN: Bottom of the page, Dr. Jacoby, page 17,  
19 where he talks about "the most troubling aspect was the fact  
20 that 70 percent of respondents correctly associated," go on,  
21 "did so because they were reading the qualifying language."

22 MR. ORR: First of all, I object to counsel reading  
23 that, but that's fine. I'll proceed.

24 Q. Dr. Jacoby, the court's concern was not that the  
25 advertisement was left in people's hands. The court's concern

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Jacoby - cross

1 was you added the language by Quality International, correct,  
2 sir?

3 A. No. The court's concern is that they could read that, and  
4 that's not the Yellow Pages. This is 24 years old. I have not  
5 seen this in 24 years. If you want to give me an opportunity  
6 to read through it, I think I can locate, I hope I can locate  
7 where the court criticized me in the Yellow Pages study for  
8 leaving the Yellow Pages ad in front of the respondent because  
9 I remember writing about that and saying, wait a minute, that's  
10 the way people use Yellow Page ads, unlike regular  
11 advertisements.

12 Q. You do recall, sir, bringing this case up in your  
13 deposition, do you not?

14 A. I do.

15 Q. And you do recall adding the words "by Quality  
16 International" to the trademark being tested in that case,  
17 correct?

18 A. That was the way in which it was being shown to the public,  
19 and that is the way I tested it.

20 Q. Now, sir, another of Judge Stein's colleagues in this  
21 Court, the Southern District of New York, Judge Keenan, has  
22 criticized one of your surveys more recently in 2007 for the  
23 failure to reflect what happens in the real world. Do you  
24 recall that, sir?

25 A. Yes, that was the Cargo case, correct.

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Jacoby - cross

1 Q. And you turned to tab three in the booklet that I provided  
2 to you, have you not, sir?

3 A. Correct.

4 Q. Let's turn to page six. In the Cargo case, and in the  
5 second column, first full paragraph, we see Judge Keenan says,  
6 "The Jacoby survey is so flawed that its probative value is  
7 substantially outweighed by its potential for unfair prejudice  
8 and the likelihood that it will confuse or mislead the jury.  
9 Two major defects strip the Jacoby survey of probative value.  
10 Specifically, the survey, one, employed a format that failed to  
11 approximate real world conditions and was impermissibly  
12 leading, and, two, used improper stimuli. The Jacoby survey's  
13 failure to approximate real world conditions severely limits  
14 its probative value."

15 You see where I'm referring to there, do you not, sir?

16 A. I do.

17 Q. And Del Monte Corp. here has the same criticism, that you  
18 did not replicate real world conditions in your survey,  
19 correct?

20 A. That's their criticism. But it's not analogous to what  
21 happened in this study, in this case.

22 Q. Now, sir, other courts have criticized you for not  
23 replicating, repeating, what happens in the real world in your  
24 surveys, correct? Do you recall that?

25 A. No survey can replicate the real world. It's not the real

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Jacoby - cross

1 world. Yes, courts have issued such criticisms, not only of me  
2 but of other experts.

3 Q. Let's look at tab four in the booklet before you. There we  
4 see the District Court's views of your survey in the Smith v.  
5 Wal-Mart Stores case, in Georgia. Do you recall that case,  
6 sir?

7 A. I do.

8 Q. Let's turn to page 22. On page 22 in the third full  
9 paragraph, the judge in the Northern District of Georgia says,  
10 "Even with regard to the tested concepts, the court finds that  
11 the survey was so flawed that it does not create a genuine  
12 issue of material fact." Moving past the citation, the court  
13 continues, "Jacoby surveyed an overbroad universe, failed to  
14 adequately replicate the shopping experience, and asked leading  
15 questions." See where I'm referring there, sir?

16 A. I do.

17 Q. And Del Monte Corp. here has the same criticisms of your  
18 report; you didn't replicate real life and you asked leading  
19 questions. Correct, sir?

20 A. That's their complaint, yeah. That's their allegations.

21 Q. Now, this is not the first time, sir, that you have  
22 submitted a survey in this court, the Southern District of New  
23 York, isn't that so?

24 A. Correct.

25 Q. By my count, sir, from your resume, which is in evidence,

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Jacoby - cross

1 119, you list cases in your resume, do you not, sir, where  
2 you've appeared and testified?

3 A. I list the last four cases in the rules -- last four years'  
4 worth of cases. I don't know what happened to 119, but --

5 Q. By my count, sir, from your resume and from the public  
6 opinions I've been able to locate, you've offered seven surveys  
7 for consideration by colleagues of Judge Stein in the Southern  
8 District of New York. Does that sound about right to you, sir?

9 A. I think there have been appreciably more, but let's take  
10 seven.

11 Q. Now, sir, in three of those surveys, and if you look in  
12 tabs five, six, and seven, and I will give you the case names,  
13 in three of those surveys, the court considered the survey  
14 without criticism. Do you recall that, sir?

15 A. No. I'd have to go back and look at these.

16 Q. All right.

17 A. Well, no. No. If you're looking at six, Juicy Couture,  
18 the court did more than not criticize. The court lauded my  
19 survey.

20 Q. Just for the record, sir, tab five has the court's opinion  
21 in the Gillette Company v. Wilkinson Sword case, and take my  
22 word for it, sir, the court did not criticize your survey?

23 A. No. She accepted it and based judgments on it and thought  
24 it was reliable.

25 Q. You're talking about the Juicy Couture case?

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Jacobby - cross

1 A. No. I'm also talking about the Gillette case.

2 Q. All right. So in Gillette not only was there no criticism,  
3 it was received?

4 A. It was received with favor.

5 Q. All right.

6 A. As was the case in Juicy Couture.

7 Q. Okay. And the next tab, sir?

8 A. I don't remember the Braun case.

9 Q. Take my word for it there again, sir, the court received  
10 your survey without criticism. So you recall those three cases  
11 receiving your survey and, in fact, lauding your survey in  
12 those cases, correct, sir?

13 A. That's correct.

14 Q. Now, in four other cases before this court, your surveys  
15 have been criticized quite severely, have they not?

16 A. Well, you were talking about the first one with tab one.

17 Q. All right.

18 A. If you --

19 Q. Simon & Shuster?

20 A. Simon & Shuster.

21 Q. You recall Judge Sand --

22 A. Criticized the word "version" and then went on to say  
23 everything else was very good about the survey. The court had  
24 very positive things to say about me and the survey.

25 Q. But he criticized --



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Jacoby - cross

1 A. As did the court, as did the Cargo court who had very nice  
2 things to say about me, but the court didn't like, and  
3 correctly so, the nonreal world juxtaposition of two ads when  
4 it likely wouldn't have happened in the real world. Totally  
5 different situation than is occurring here.

6 Q. When you say that the courts said nice things about you,  
7 sir, they certainly did not criticize your credentials in those  
8 cases, correct?

9 A. Certainly the truth.

10 Q. And Del Monte Corp. is not criticizing your credentials in  
11 this case, true?

12 A. That is correct.

13 Q. In Simon & Shuster, Judge Sand criticized your failure to  
14 define version; we've been through that?

15 A. Yes.

16 Q. And Cargo Global, Judge Keenan criticized your survey and  
17 did not receive it, correct, sir?

18 A. Correct.

19 Q. Now, let's turn to tab eight, and there we see the opinion  
20 in Weight Watchers International v. The Stouffer Corporation,  
21 do you recall that case, sir?

22 A. Yes, I do.

23 Q. Let's turn to page 12 of that case. And on page 12, sir,  
24 if we turn to the first full paragraph in the second column, we  
25 see Judge Mukasey -- by the way, Judge Mukasey was the judge in

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Jacoby - cross

1 that case, correct, sir?

2 A. Correct.

3 Q. Judge Mukasey states, first full paragraph, on page 12,  
4 "The market study conducted for defendants in this case has  
5 even less probative value. It is obvious that Dr. Jacob  
6 Jacoby, a veteran of the trademark litigation arena, and the  
7 creator of the Stouffer's survey, constructed the study  
8 specifically to disprove consumer confusion regardless of  
9 participants' reactions to the advertisements." Do you see  
10 that, sir?

11 A. I do.

12 Q. So what Judge Mukasey criticized in that case is you  
13 disregarded what the respondents were saying in response to  
14 your survey, correct, sir?

15 A. No. He was criticizing something else with which, part of  
16 which I agree with and part of which I disagree with. That's  
17 my recollection. Again, this is also over 20 years old.

18 Q. Dr. Jacoby, you do recall Judge Mukasey indicating that the  
19 study specifically attempted to disprove consumer confusion  
20 regardless of the participants' reactions to the advertisements  
21 being tested in that case? Do you recall that, sir?

22 A. I don't recall that, and if I did, I would disagree with  
23 it. Obviously the court's entitled to its opinion, and I'm  
24 entitled to mine.

25 Q. Certainly Judge Mukasey didn't receive your survey in that

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Jacoby - cross

1 case with open arms, did he, sir?

2 A. He did not, for all kinds of reasons, I guess.

3 Q. Let's turn to tab nine in the booklet I provided to you,  
4 and there, we see the Louis Vuitton v. Dooney & Bourke case,  
5 and that case was decided in 2007, was it not, sir?

6 A. Yes, it was.

7 Q. And that was a case in which Judge Stein's colleague, Judge  
8 Scheindlin, sat and reviewed your work, isn't that so?

9 A. That is so.

10 Q. And Judge Scheindlin had no regard whatsoever, did she, for  
11 your report?

12 A. For any of the surveys conducted by any side, either side.

13 Q. She wrote two opinions in that case, both of which  
14 criticized your survey, isn't that so?

15 A. I believe she wrote one and special masters wrote a second.

16 Q. Let's look at this opinion, sir. And you'll see, if you  
17 take a moment, this is Judge Scheindlin's opinion adopting the  
18 views of the special master, isn't that so?

19 A. I don't know which one this is. If you represent that's  
20 the one, correct.

21 Q. Well, indeed, the special master's opinion is attached to  
22 this decision, is it not, sir?

23 A. Thumbing through this, I cannot see --

24 THE COURT: What page is it? Direct him to a  
25 particular page.

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Jacoby - cross

1 BY MR. ORR:

2 Q. If you turn to page 12, 13 of Judge Scheindlin's opinion,  
3 sir, the next page contains the special master's opinion  
4 criticizing your work, isn't that so?

5 A. Yes. Yup, I see it.

6 Q. Let's turn to page eight of Judge Scheindlin's opinion, and  
7 you see on page eight there's a section entitled Dr. Jacob  
8 Jacoby, do you see that, sir?

9 A. I do.

10 Q. And on page eight, second column, first full paragraph, in  
11 the second sentence, Judge Scheindlin says, "In considering the  
12 cumulative effect of the numerous flaws identified by the  
13 special masters, it is clear that Dr. Jacoby's report and  
14 testimony on the issues of both trademark confusion and  
15 dilution are unreliable." Do you see that, sir?

16 A. I do.

17 Q. Now, Judge Scheindlin wrote another opinion in the Louis  
18 Vuitton case, do you recall that?

19 A. I think an earlier one, yes.

20 Q. And in that opinion, she was also critical of your work?

21 A. On the same subject.

22 Q. Let's turn to tab ten, and there we see the earlier  
23 decision by Judge Scheindlin in the Louis Vuitton v. Dooney &  
24 Bourke case, do we not?

25 A. We do.

C42Wfire3

Jacoby - cross

1 Q. Now, in this opinion, Judge Scheindlin was troubled by the  
2 fact that your survey had changed during the course of the  
3 conduct of the survey, isn't that so?

4 A. Yes.

5 Q. And I think you explained to Judge Scheindlin that that was  
6 a mistake in that case, correct, sir?

7 A. No. I explained that when the first bunch of respondents'  
8 data came in, we saw that there were ambiguities, and so the  
9 study was broken apart. And each of the two component, namely,  
10 the likely confusion and the dilution, were then tested in  
11 separate ways.

12 Q. Let's turn to page 26 of Judge Scheindlin's earlier opinion  
13 in the Louis Vuitton case, tab ten of the binder that I have  
14 provided to you. And in the second column under the heading  
15 survey methodology and execution, we see Judge Scheindlin says,  
16 "Dooney & Bourke argues that the survey is irremediably flawed  
17 in part because it was not conducted in the manner described in  
18 Dr. Jacoby's expert report but was conducted in two separate  
19 rounds with the design modified halfway through to increase the  
20 number of confusion responses." Do you see where I'm referring  
21 there, sir?

22 A. I see where that's written, yes.

23 Q. And, Dr. Jacoby, further down in that paragraph, Judge  
24 Scheindlin points out, "Dr. Jacoby explained that although  
25 phase two of the study should have been run with two bags, the

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Jacoby - cross

1 white and black wrist lets, due to a mistake on the part of  
2 Dr. Kaplan, who was responsible for the interview process, only  
3 the white wristlet was used." Do you see that, sir?

4 A. I do.

5 Q. And Judge Scheindlin was concerned about that in that case,  
6 the change in the methodology of the study midstream, correct?

7 A. That's a different thing. Dr. Kaplan and I have a letter  
8 from Dr. Kaplan saying it was totally his responsibility --

9 MR. ORR: Your Honor, I move to strike.

10 THE COURT: Yes. Can you answer?

11 THE WITNESS: Yes.

12 A. You're conflating two things, you're mixing up two things.  
13 If you give me an opportunity to explain, I will, but it's your  
14 choice.

15 Q. I'm asking you what the judge said, sir, and the judge very  
16 plainly just said what I just read to you, correct?

17 A. The judge wrote that, but you are combining, you're taking  
18 two things and you're making them as if they're one, but, no,  
19 you're not correct. This is not a correct interpretation. You  
20 can read these facts, but taking them out of context, you're  
21 giving them a wrong, false meaning.

22 Q. Let's try --

23 A. You may do that.

24 Q. Let's try the next page. Turn to page 27 and see what  
25 Judge Scheindlin has to say about you there. On page 27, in

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Jacoby - cross

1 footnote 161, at the bottom of the first column, left-hand  
2 side, Judge Scheindlin says, "The court may have been more  
3 sympathetic had Jacoby himself not formulated the same survey  
4 question, rejected in Novonordisk and had that court not  
5 suggested to him what would have been acceptable. However,  
6 Jacoby apparently has not learned from his mistakes, which,  
7 contrary to plaintiff's assertions that Jacoby's surveys have  
8 been universally relied upon and have never been rejected by a  
9 court seem to be numerous." Do you see that, sir?

10 A. I do.

11 Q. Judge Scheindlin thought you make a lot of mistakes, don't  
12 you, Dr. Jacoby?

13 A. That's not Judge Scheindlin. She's quoting from a  
14 different judge, and that judge took things out of context,  
15 took things off, like the sentence have been universally relied  
16 upon in sports NFL studies, took that qualifier off, made it  
17 sound as if the attorney was claiming I had never been  
18 criticized when he was claiming in about a half dozen NFL  
19 studies I'd never been criticized. What do you do when the  
20 court here is criticizing other there are 30 other courts  
21 including the Second Circuit of New York has accepted and  
22 changed the law based upon that very question, but the District  
23 Court wasn't aware of that. What do you do when the courts  
24 disagree?

25 Q. My question to you, sir, was: Judge Scheindlin recorded

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Jacoby - cross

1 this language in her opinion, correct?

2 A. Correct. That's not her language.

3 Q. And she was quoting another judge?

4 A. That's true.

5 Q. Out in Wisconsin, correct?

6 A. That's true.

7 (Continued on next page)

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C42FFRE4

Jacoby - cross

1 Q. So two federal judges were of the view that you make a lot  
2 of mistakes and you don't learn from it, correct, sir?

3 A. That's --

4 Q. Yes or no, sir?

5 A. That's their view.

6 Q. Two federal judges --

7 THE COURT: You have the answer, sir. You asked the  
8 question, you have the answer.

9 MR. ORR: Thank you, your Honor.

10 THE COURT: Move on.

11 Q. And you are of the view, are you not, Dr. Jacoby, that you  
12 don't need a Court to tell you what is proper science, correct?

13 A. I don't need a Court to tell me one of the most honored  
14 science -- one of the most awarded scientists in my field, in  
15 fact, somebody whom the Bar Association came to and invited me  
16 to write the book on science. I don't need a Court to tell me  
17 what proper science is, when the research shows many Courts do  
18 not understand science.

19 MR. ORR: Let me ask if we could put up on the board,  
20 Andrew, Dr. Jacoby's deposition at page 100.

21 Q. And let's just look at the language right in the middle of  
22 the page, starting on line 15. Do you recall giving this  
23 testimony at your deposition, do you not, sir?

24 A. I certainly do. And look at the sentence before. If you  
25 talk to authorities and scientists, they'll tell you what I'm

C42FFRE4

Jacoby - cross

1 saying is right.

2 Q. All right, let's, sir, let's keep it Q and A here, okay?  
3 You don't need a Court to tell you what you think is proper  
4 science, correct?

5 A. That is correct.

6 Q. You don't need any lawyers to tell you, correct?

7 A. If they have doctorates --

8 Q. Yes or no, you don't need --

9 A. That's correct. I don't need a lawyer to tell me what is  
10 or isn't proper science.

11 Q. Let's turn to page 103 of Dr. Jacoby's deposition. And  
12 we'll start on page 8. I'm sorry, line 8. Once again, this  
13 expresses your attitude, does it not, sir?

14 A. It certainly does. A hundred percent.

15 Q. Now, sir, we were conducting a survey of your surveys in  
16 the Southern District of New York and we saw three that were  
17 received without criticism, indeed lauded by the judges,  
18 correct, sir?

19 A. As I said, I think there are more than seven, but of those  
20 seven, yes.

21 Q. And four that we've just gone through, were severely  
22 criticized, correct?

23 A. Were criticized, yes.

24 Q. Now, four out of seven, sir, that's 57 percent, is it not?

25 A. If you take a look at the hundred or so cases in which I've

C42FFRE4

Jacoby - cross

1 testified --

2 Q. Sir --

3 A. You'll find 90 percent of the time the courts will accept  
4 what I say.

5 THE COURT: Sir, the question is what percentage is  
6 four over seven. Do you happen to know?

7 Q. It's 57 percent, is it not, sir?

8 A. You're right, it's 57 percent.

9 Q. Now, you understand that in this case Del Monte Corp. has  
10 not asked his Honor to comment on your report one way or the  
11 other, that is for the jury to decide, correct?

12 MR. PLEVAN: Objection.

13 THE COURT: Sustained.

14 Q. Now, sir, we have seen, have we not, and you've told us  
15 right this moment that you don't care what lawyers say,  
16 correct?

17 MR. PLEVAN: Objection.

18 A. Incorrect. I said about science.

19 Q. About science. You don't care what judges say about  
20 science, correct?

21 A. I have to care, but I don't necessarily have to agree and  
22 when they're wrong and I know from my science that I'm right  
23 and that most scientists agree with me, then I know I'm right.

24 Q. All right. You disregarded what the respondents in your  
25 survey said, correct, sir?

C42FFRE4

Jacoby - cross

1 A. Because according to the authorities in my science, the  
2 experimental research will trump what they say because the  
3 scientists understand from study after study that we as human  
4 beings cannot tell what is causing our responses in situations  
5 like these.

6 Q. Well, let's just get this straight. You disregarded the  
7 verbatims in your survey but you regarded the verbatims in the  
8 Hall & Partners study, correct, sir?

9 A. They didn't do the statement. That's the only thing I had  
10 to go on. There was nothing to trump what they said there. I  
11 would venture to say Del Monte Corp. relied on Hall & Partners.

12 Q. Well, they're not relying on it for the same purposes that  
13 you're attempting to, are they, sir?

14 A. Well --

15 Q. Yes or no, sir?

16 A. Yes.

17 Q. Now, we agreed earlier, sir, that every survey has  
18 potential flaws, correct?

19 A. Correct.

20 Q. And that principle certainly applied to the surveys that  
21 Judge Stein's colleagues in this court criticized that we've  
22 been talking about here today, correct?

23 A. Every survey, including my surveys has potential flaws.

24 MR. ORR: I have no further questions, your Honor.

25 THE COURT: All right. Thank you. Is there any

C42FFRE4

Jacoby - redirect

1 cross-examination?

2 MR. PLEVAN: Redirect.

3 THE COURT: I'm sorry. Any redirect, you're quite  
4 correct.

5 MR. PLEVAN: Thank you, Judge.

6 REDIRECT EXAMINATION

7 BY MR. PLEVAN:

8 Q. Dr. Jacoby, I'll ask you a few questions then I'll go back  
9 and get my materials. But you testified on direct that you  
10 have testified in federal court about a hundred times.

11 A. That's correct.

12 Q. And have you testified and been hired for federal court  
13 cases in the last year?

14 A. Yes, many.

15 Q. And the year before that?

16 A. Yes.

17 Q. And the year before that?

18 A. Yes.

19 Q. So one wonders if you've been criticized on I think it's  
20 four or five cases that have been pointed out, how is it that  
21 lawyers keep hiring you?

22 MR. ORR: Objection.

23 THE COURT: Sustained.

24 Q. Dr. Jacoby, this line of questioning that you had today  
25 about some of these cases where you've been criticized before,

C42FFRE4

Jacoby - redirect

1 have you had that line of questions put to you before?

2 MR. ORR: Same objection.

3 THE COURT: I'll allow that.

4 A. Yes, I have.

5 Q. On many occasions?

6 A. Yes.

7 Q. And lawyers keep coming back to you and hiring you?

8 MR. ORR: Same objection, your Honor.

9 THE COURT: Have you been -- you did say you've been  
10 recently hired, correct, by lawyers?

11 THE WITNESS: Yes.

12 THE COURT: All right, next question.

13 Q. And in those cases the purpose of that was to put you in a  
14 federal court to testify, was that the purpose?

15 MR. ORR: Objection. Leading.

16 THE COURT: Sustained.

17 Q. What was the purpose when you were hired in those cases by  
18 those lawyers?

19 A. The purpose was to do research. If the research supported  
20 what they, their position, and as I said earlier, on Thursday,  
21 it doesn't always support, but if it does support, then they  
22 have me come in, and I might mention, Morrison & Foerster --

23 MR. ORR: Objection.

24 Q. Dr. Jacoby --

25 THE COURT: Sir, don't volunteer. Just answer the

C42FFRE4

Jacoby - redirect

1 question as narrowly as possible.

2 THE WITNESS: Yes, sir.

3 THE COURT: So, too, if they can be answered "yes" or  
4 "no" do so in response to Mr. Plevan's questions. Proceed,  
5 Mr. Plevan.

6 Q. Now, Dr. Jacoby, have there also been situations where you  
7 didn't actually testify in federal court but perhaps your  
8 deposition or an affidavit was used?

9 A. Yes.

10 Q. And this might end up in a reported decision?

11 A. Correct.

12 Q. Every time you have testified, do you know whether or not  
13 if a judge accepted your findings you were, your name was  
14 mentioned in the opinion?

15 A. I know in many instances it's not.

16 Q. So that if counsel for the defendants for Morrison &  
17 Foerster did research and said they've located all --

18 THE COURT: Sustained as phrased.

19 MR. PLEVAN: Pardon?

20 THE COURT: Sustained as phrased.

21 MR. PLEVAN: Yes.

22 THE COURT: The record will show the DMC lawyer  
23 standing to object.

24 Q. If someone were to just research names, would that show all  
25 the cases in which you have been, you testified and your survey

C42FFRE4

Jacoby - redirect

1 was accepted by the Court?

2 A. It would not.

3 Q. Let me give you an example, for example. As an example.

4 Do you remember a case in front of Judge Cederbaum called

5 Tambrands v. Warner Lambert?

6 A. Yes, I do.

7 Q. Do you recall approximately how long that was?

8 A. 28, 30 years ago.

9 Q. Say 25?

10 A. 25.

11 Q. Who was the lawyer that hired you in that case?

12 A. The lawyer that cross-examined me for this case. You were  
13 the opposing attorney.

14 Q. All right, let's slow down.

15 MR. ORR: Objection, your Honor.

16 Q. So who was the lawyer -- we'll get do that.

17 THE COURT: No, no. I'll allow the answer. Go ahead.

18 Q. By name, who was the lawyer that hired you in this --

19 A. Bruce Keller of Debevoise Plimpton.

20 Q. Bruce Keller of Debevoise & Plimpton. Is he in the  
21 courtroom?

22 A. No, he's not.

23 Q. Did he take your deposition in this case?

24 A. Yes, he did.

25 Q. And has Mr. Keller hired you and his firm hired you from



C42FFRE4

Jacoby - redirect

1 time to time over the years?

2 A. Yes, he has.

3 Q. Recently?

4 A. No, I think recently I've opposed his firm on another  
5 matter.

6 Q. And so when Mr. Orr asked you he said we never met before,  
7 that's because he took your deposition in this case?

8 A. That's correct.

9 Q. And Mr. Keller was in this Tambrands case?

10 A. That's correct.

11 Q. He was the lawyer that hired you?

12 A. Correct.

13 Q. And who was on the other side?

14 A. You were.

15 Q. Okay. Now, you testified that there was about ten years in  
16 which you and I did not work together?

17 A. Correct.

18 Q. During that period of time, were you hired by a law firm  
19 called Morrison & Foerster?

20 A. Yes, I was.

21 Q. And is that the law firm Mr. Orr is with?

22 A. Yes.

23 Q. On how many occasions during that ten-year period when you  
24 weren't working with me were you hired by Morrison & Foerster  
25 to conduct surveys?

C42FFRE4

Jacoby - redirect

1 A. Three.

2 Q. How many offices of Morrison & Foerster was involved in  
3 those retentions?

4 MR. ORR: That I object to, your Honor.

5 THE COURT: I'll sustain the objection on the grounds  
6 of relevance.

7 Q. In what kind of cases were you hired by Morrison &  
8 Foerster?

9 A. One or actually two, probably. Different surveys, the  
10 Federal Trade Commission was coming out with regulations on how  
11 the TV manufacturers were to describe the diagonal size of  
12 their televisions and I did studies. Morrison & Foerster was  
13 one of a number of firms, but they were the lead firm  
14 representing Samsung and Sony and half dozen of the major TV  
15 manufacturers were the clients in that case.

16 Q. Were there other cases in which Morrison & Foerster hired  
17 you --

18 A. Yes.

19 MR. ORR: Your Honor, I think we've beaten this horse  
20 to death. Objection.

21 THE COURT: I'll overrule the objection. The question  
22 has been answered. Next question.

23 Q. Were other cases for use in federal court case testimony?

24 A. Yes.

25 Q. Now, this Mr. Keller you referred to took your deposition

C42FFRE4

Jacoby - redirect

1 in this case. You also testified about doing a book, that you  
2 did a book for the American Bar Association?

3 A. I just finished it about a month ago.

4 Q. And who did you call to ask if he would be your co-author  
5 in that situation?

6 A. At one point I asked Mr. Keller if he would like to  
7 co-author it with me.

8 Q. Is he also in the category of the people you'd refer to as  
9 your good friend?

10 THE COURT: Sustained. Move on. The record would  
11 show the opposing attorney was not rising to object.

12 Q. If we could look at these cases that Mr. Orr pointed out  
13 that some of the judges commented favorably on your surveys,  
14 correct?

15 A. Yes.

16 Q. So just looking at the ones Mr. Orr has brought to our  
17 attention if you'd like at tab 5. And if you look at page 8,  
18 right above where it says "welcomes its criticisms," do you see  
19 that?

20 A. Yes.

21 Q. Just read what Judge Wood said in this particular case, at  
22 the paragraph that begins "the Court finds."

23 A. "The Court finds that Dr. Jacoby made a good faith effort  
24 to and did conduct fair unbiased consumer studies using  
25 methodology consistent with both industry standards and the

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Jacoby - redirect

1 requirements set forth by Courts for evaluating what is  
2 communicated to by advertisements."

3 Q. If you would turn to tab 6, and this would be a decision by  
4 Judge Cote, Denise Cote, as referred to before, Juicy Couture,  
5 and if you would turn to page 22. Do you see footnote 33 on  
6 page 22?

7 A. Yes, I do.

8 Q. Could you read that into the record, please?

9 A. Quote, "It is unnecessary to spend time addressing  
10 Coutour's attacks on the Jacoby survey, since Couture has  
11 failed to show any actual confusion and it carries the burden  
12 to do so. Suffice it to say that the attacks on Jacoby's  
13 well-designed survey was strained and unpersuasive."

14 Q. Dr. Jacoby, have other Courts made similar comments about  
15 your surveys?

16 A. Many of the Courts.

17 Q. Have any judges actually heard all these kinds of  
18 criticisms that Mr. Orr brought out, gone back and looked at  
19 those cases and then expressed the Court's view about those  
20 criticisms?

21 MR. ORR: Objection.

22 THE COURT: Sustained as phrased.

23 Q. Dr. Jacoby, have Courts commented on when these issues have  
24 been raised about criticisms of you personally?

25 A. Yes.

C42FFRE4

Jacoby - redirect

1 Q. And do you have a specific case in mind, recent case?

2 A. There was a case from nine years ago about, after many of  
3 the criticisms, it was Wells Fargo, it was in U.S. District  
4 Court of Detroit. I've forgotten the judge's name, but she  
5 went back and she read all of the cases and then came back and  
6 had a very nice paragraph where she said she'd read the cases  
7 where it was claimed that I had --

8 MR. ORR: Your Honor, I object to --

9 THE COURT: Yes, sustained.

10 Q. What was the judge's conclusion?

11 MR. ORR: Objection.

12 THE COURT: Just a moment. Sustained.

13 MR. PLEVAN: I'll try one more time, Judge.

14 Q. Did the judge in this particular case review the cases  
15 where you had been previously criticized?

16 A. Yes.

17 Q. What did she rule with respect to your survey?

18 MR. ORR: Same objection, your Honor.

19 THE COURT: Sustained.

20 Q. What was your understanding of what she ruled?

21 MR. ORR: The same objection. That doesn't help.

22 THE COURT: Mr. Orr is correct. The same ruling. Is  
23 it fair to say, sir, that of the numerous times that you have  
24 presented surveys and testified in federal courts certain  
25 judges have praised your surveys and methodologies and other

C42FFRE4

Jacoby - redirect

1 judges have criticized your surveys and methodologies?

2 THE WITNESS: It's fair to say, your Honor --

3 THE COURT: All right. Thank you.

4 Q. Approximately what percent of the total times you've  
5 testified in federal court --

6 MR. ORR: Objection.

7 Q. -- that you've been criticized?

8 THE COURT: I'll allow that.

9 A. About 10 percent of the time I've been criticized. About  
10 90 percent of the time the Courts have accepted and in most  
11 cases lauded, praised my research. Nobody's perfect and I'm  
12 not.

13 Q. Now, you were asked a number of questions on  
14 cross-examination about fresh versus preserved, correct?

15 A. Yes.

16 Q. And you were actually read a number of the verbatims that  
17 counsel suggested to you showed that people thought that the  
18 word "fresh" meant not stale. Do you recall that?

19 MR. ORR: Object to form.

20 THE COURT: I'll allow that.

21 Q. Generally, do you recall that testimony?

22 A. Yes, I do.

23 Q. And if you would open up your binder to the tab, of your  
24 report, appendix H --

25 MR. PLEVAN: What exhibit number was that, counsel?

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Jacoby - redirect

1 MR. ORR: 133.

2 Q. I believe it's Exhibit 133, but you have appendix H in  
3 your --

4 A. Yes, I do.

5 Q. And it begins in your report on page 283? Appendix H.

6 A. Yes, that's the cover page on 283. It actually begins on  
7 page 284.

8 Q. Go to the last page. What's the last page of this exhibit?

9 A. 312.

10 Q. And if we could see one page, approximately, take an  
11 estimate of, there's two columns --

12 THE COURT: Sir, sir. Look at Exhibit 133.

13 MR. PLEVAN: I'm sorry, your Honor?

14 THE COURT: Do you have Exhibit 133 in front of you?

15 MR. PLEVAN: No, your Honor. I have the exact same  
16 thing in Dr. Jacoby's report.

17 THE COURT: Well, I just show a different last page.  
18 That's all. I don't mean to engender confusion here.

19 MR. PLEVAN: I think that was the problem we had  
20 before. I now have the exhibit and the first one I have here  
21 is --

22 THE COURT: The last one.

23 MR. PLEVAN: Goes from page 284 and the last one in  
24 the exhibit is 313. So that's approximately 30 pages.

25 THE WITNESS: Nearly 30 pages, yes.

C42FFRE4

Jacoby - redirect

1 Q. And if you look at the first page -- if we could just go to  
2 page 284 would be the first page. Approximately how many  
3 entries are there in each column on this page?

4 A. Actually, there are 18 respondents. Each column refers to  
5 a single respondent. In other words, if you read across. So  
6 there are nearly 20 respondents per page for nearly 30 pages  
7 which gets up to the 600 or so people I spoke about.

8 Q. And then, but how many different responses are you  
9 recalling on that page?

10 A. Twice for each respondent, so it works out to about 1200  
11 responses and counsel only read about five, I think.

12 Q. That's my recollection as well.

13 MR. ORR: Your Honor, object --

14 THE COURT: Yes, the jury, remember, what lawyers say,  
15 even with all this by-play, ladies and gentlemen, it's the  
16 answers that are evidence, not what lawyers say. Not the  
17 questions, just the answers.

18 Q. Dr. Jacoby, on cross-examination were you asked any  
19 questions about what you've described as convergence of the  
20 data and what that means?

21 A. I think I was, yes.

22 Q. And what is your testimony on convergence of the data?

23 MR. ORR: This is beyond the scope.

24 THE COURT: Sustained as to form.

25 Q. You were asked a number of questions as to whether or not



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Jacoby - redirect

1 you should have defined the terms "fresh" and "preserved." Do  
2 you recall that?

3 A. Yes.

4 Q. Now, what is your view as to when shoppers go in, what is  
5 your view as to whether they know what those terms mean?

6 MR. ORR: Your Honor, we've been over this on direct.

7 THE COURT: And that's why he's -- and you went over  
8 it on cross and that's why he's entitled to do it on redirect.

9 A. My view is the vast majority of consumers understand what  
10 "fresh" means in this context and they understand what  
11 "preserved" means in this context, and the evidence for that  
12 comes out in various ways.

13 Q. All right. Without going back over this evidence, if they  
14 know what the words mean, what, then, does your survey show  
15 with respect to when they confront one of the products you  
16 tested?

17 A. It shows approximately a third of the people are confused  
18 or deceived or misled into believing that the fruit in those  
19 products is fresh fruit.

20 Q. Even though in your view they understand what the words  
21 mean?

22 A. They understand what it means and they're using it properly  
23 and they're answering the question properly.

24 Q. Now, you were asked questions about an excerpt from  
25 Professor McCarthy's treatise. Do you recall that?

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Jacoby - redirect

1 A. Yes, I do.

2 MR. PLEVAN: Can I have the first page of that  
3 section? Could we highlight the section where it begins "it is  
4 notoriously easy," and blow that up?

5 Q. Do you see this? Dr. Jacoby, I'm going to read it to you  
6 and ask you if you agree with this: "It is notoriously easy  
7 for one survey expert to appear to tear apart the methodology  
8 of the survey taken by another." Do you see that?

9 A. Yes, I do.

10 Q. Do you agree with that comment by Professor McCarthy?

11 A. I do.

12 Q. And what if anything, if you compare tearing apart someone  
13 else's survey or doing your own, which is easier and which is  
14 harder?

15 A. It's a heck of a lot easier to tear someone's survey apart  
16 than to design one that will stand up under cross-examination  
17 in court.

18 Q. You were asked questions about, or you offered answers  
19 related to the difference between an experiment and being asked  
20 questions that was not part of an experiment. Could you  
21 elucidate that?

22 A. Yeah. The social scientists have a whole variety of  
23 techniques for examining human behavior and what leads to it.  
24 One is simple observation. The next rung is surveys, where you  
25 ask questions, but surveys can be, depending upon what you ask,

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Jacoby - redirect

1 notoriously unreliable.

2 The next level would be experiments, which are considered  
3 to be the gold standard across all the sciences for determining  
4 cause/effect.

5 The first part of my study was an experiment which got at  
6 cause/effect and overcame the limitations that many people,  
7 that many people in the social sciences subscribe to and know  
8 and have known about for years. Surveys offer in many ways  
9 unequivocal evidence, whereas simple verbal statements do not.  
10 I could go on at length, but I really don't want to take the  
11 time.

12 Q. If we go back to Exhibit 129, page 8, just look at the 2A  
13 question that you asked. I think you were asked on cross or it  
14 was suggested to you that this was leading the responses to one  
15 answer or the other. Is it leading? Was it leading,  
16 Dr. Jacoby?

17 MR. ORR: Beyond the scope. I never talked about  
18 this, your Honor.

19 MR. PLEVAN: Specifically said, your Honor, that one  
20 of the criticisms was that Dr. Jacoby --

21 THE COURT: I will allow the question. It is not  
22 beyond the scope.

23 A. It's not leading. Again, bear in mind we emphasize right  
24 before this that they could tell us don't know and we emphasize  
25 don't guess. And then we didn't say does this cut fruit

C42FFRE4

Jacoby - redirect

1 product contain fresh fruit or preserved fruit, it began if you  
2 can tell, right up front. It didn't force them to choose fresh  
3 or preserved and as we saw from the data that I showed you,  
4 many people said "don't know" and many people said "preserved."

5 Q. Now, is this the experiment part of what you were talking  
6 about?

7 A. Yes. That comes right after they've seen the different  
8 videos and held the different products, and these people were  
9 in separate groups. Nobody in one group knew about the other  
10 group, who were looking at the other products.

11 Q. Comparing this, then, to Hall & Partners was Hall &  
12 Partners an experiment?

13 A. It was not.

14 Q. Is that why you have to look at what the consumer said?

15 A. That's all we said. Correct, that's why I had to look at  
16 that.

17 Q. Is it still reliable what you looked at in Hall & Partners?

18 A. It's not as strong evidence as an experiment, but it is  
19 evidence that I know, quote, the other side can't criticize  
20 that I slanted something. I mean, they commissioned it. It's  
21 their research and here's what their research showed at the  
22 very beginning that large numbers of people were taking away  
23 the meaning the fruit was fresh.

24 Q. Dr. Jacoby, having heard all the criticisms, would you  
25 design the survey differently?

C42FFRE4

Jacoby - redirect

1 A. Not a whit, no way.

2 Q. Do you believe it was done properly and in accordance with  
3 the standards of your profession?

4 A. I do. I mean, there are always tradeoffs. Surveys and  
5 research are not the real world. They try to approximate it,  
6 and sometimes you have to approximate it one way and you have  
7 to relinquish approximating it in another way. True, people  
8 aren't -- people are allowed to hold the product in the real  
9 world, but in the real world they don't go into it knowing that  
10 they're going to be asked questions about it immediately  
11 thereafter. They don't go into it with an interviewer there  
12 who says here's my question, is it fresh or preserved and the  
13 respondent can immediately say, oh, wait a minute, give me a  
14 chance, let me read the package and see what it says about  
15 that. If they didn't pay attention to that up front and they  
16 were asked to look at these things as they do in the real world  
17 and they knew they were going to be asked questions about it  
18 and they had as much time as they wanted to read it, and you  
19 still get these dramatic differences, that's what counts.

20 MR. PLEVAN: May I have a minute, your Honor?

21 THE COURT: Yes.

22 (Pause)

23 MR. PLEVAN: Nothing further, Judge.

24 THE COURT: Thank you. Is there any recross?

25 MR. ORR: Very briefly, your Honor.

C42FFRE4

Jacoby - recross

1 THE COURT: Sure.

2 MR. ORR: Which are, of course, famous last words.

3 RECROSS EXAMINATION

4 BY MR. ORR:

5 Q. Dr. Jacoby, on redirect examination you were asked if I  
6 only pointed out to you five excerpts from Appendix H, Exhibit  
7 133. Do you recall that, sir?

8 A. I don't think I was asked that. I think I offered that. I  
9 said my recollection was approximately five.

10 Q. We could spend the rest of the afternoon on appendix H,  
11 sir, but let's look at one more excerpt. It's in evidence, the  
12 jury can consider it for all of the items that are in there.

13 Let's turn to page 286 and look at the respondent 11621's  
14 response. 11621 said: "I think it's fresh because it's  
15 preserved in the container." Did he or she not, Dr. Jacoby?

16 A. That was one that we looked at, yes.

17 Q. No, we did not look at that one, sir. That was on 294.  
18 And as I said you have not looked at appendix H to see how  
19 people were using the term "fresh" in preparation for your  
20 testimony today, correct?

21 A. That is correct I did not look before coming today. I  
22 looked when I did the study two years ago.

23 Q. So we have a second person who used the terms "fresh" and  
24 "preserved" in the verbatim response, correct?

25 A. Correct.

C42FFRE4

Jacoby - recross

1 Q. We'll scan up to the top of this page. Let's look at the  
2 first item. Do you see "it looked fresh"?

3 A. Right.

4 Q. If we scan down, you see "the appearance is fresh," "the  
5 way it's packaged looks fresh."

6 A. Right.

7 Q. You see all those responses, do you not, sir?

8 A. I do.

9 Q. A lot more than five, aren't there, doctor?

10 MR. PLEVAN: Objection.

11 A. No, that supports what I'm saying.

12 THE COURT: I'll allow it. What's your answer?

13 A. That supports what I'm saying. Remember, this is the  
14 answers to 2B which is to explain their answer why they thought  
15 it was fresh. It's because of the way it's packaged, looks  
16 fresh, the appearance is fresh, the juice it's in looks fresh.  
17 So they're explaining why they think, why they answered it's  
18 fresh.

19 THE COURT: Sir?

20 BY MR. ORR:

21 Q. Yes, and the point I was making, sir, and I'm happy for you  
22 to look at the juice it's in looks fresh, you referred to that  
23 one previously, correct, sir?

24 A. Just now, yes.

25 Q. And in fact this goes back to the point that far more

C42FFRE4

Jacoby - redirect

1 people talked about the appearance than talked about the three  
2 reasons that Fresh Del Monte has offered here, correct, sir?  
3 Yes or no, sir? Far more people chose the appearance rather  
4 than the three factors that Mr. Plevan raised with you in the  
5 first conversation that you had in this case, correct?

6 A. That is correct.

7 MR. ORR: No further questions, your Honor.

8 THE COURT: Mr. Plevan?

9 REDIRECT EXAMINATION

10 BY MR. PLEVAN:

11 Q. Dr. Jacoby, the five we were talking about was how many  
12 people said that fresh means spoiled.

13 MR. ORR: Leading.

14 THE COURT: I don't have a question. Why don't you  
15 ask a question?

16 Q. What were the five that you and I were talking about just a  
17 minute ago?

18 A. I believe they referred to the fruit being spoiled.

19 Q. And that was all?

20 A. And that was it.

21 Q. Did you see any more on this page that talked about the  
22 fruit being spoiled?

23 A. No, I did not.

24 Q. And as far as those who talked about the appearance of  
25 fresh, have you already pointed out the reasons based on the



C42FFRE4

Jacoby - redirect

1 literature and other reasons why you didn't count that?

2 A. I would love to point out more and just read into the  
3 record --

4 THE COURT: No.

5 MR. ORR: Objection.

6 THE COURT: Have you, sir?

7 THE WITNESS: Yes, I have. I'm sorry.

8 THE COURT: Thank you.

9 Q. And what was the leading article that you talked about?

10 MR. ORR: Beyond the scope.

11 THE COURT: Just a moment. The leading article he  
12 talked about when?

13 MR. PLEVAN: On direct testimony that related to this  
14 very issue that these appearance issues --

15 THE COURT: Objection sustained.

16 MR. PLEVAN: Nothing further, Judge.

17 THE COURT: All right. Thank you. You may step down,  
18 sir. You are excused.

19 (Witness excused)

20 THE COURT: All right, counsel, if you'll take all  
21 these documents. Plaintiff, next witness.

22 (Pause)

23 THE COURT: Next witness?

24 MS. AGUIAR: Your Honor, due to various witnesses'  
25 availability, we've agreed that Mr. Lazopoulos would be the

C42FFRE4

Lazopoulos - direct

1 next witness to testify.

2 THE COURT: That's witness for the defense?

3 MS. AGUIAR: The defense wanted to call him, yes.

4 THE COURT: Ladies and gentlemen, again, because of  
5 scheduling matters, the availability of witnesses, what the  
6 parties have agreed is rather than have the next plaintiff's  
7 witness, we're going to have a defense witness, all right? So  
8 this witness is being called by Del Monte Corporation, one of  
9 the defendants. Mr. Gonzalez, call your witness.

10 MR. GONZALEZ: Your Honor, call Mr. Lazopoulos.

11 EMANUEL JOHN LAZOPOULOS,

12 called as a witness by the Defendant,

13 having been duly sworn, testified as follows:

14 THE COURT: Welcome, sir. Please pull your chair  
15 forward and speak loudly, clearly and slowly into the  
16 microphone. Mr. Gonzalez, your witness, sir.

17 MR. GONZALEZ: Thank you, your Honor.

18 DIRECT EXAMINATION

19 BY MR. GONZALEZ:

20 Q. Sir, you are the senior vice president of sales, product  
21 marketing and management for Fresh Del Monte?

22 A. Yes.

23 Q. And you began working for them in June 2003?

24 A. Yes.

25 Q. You were here last week to testify in this case?

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Lazopoulos - direct

1 A. Yes, I was.

2 Q. And a decision was made by the plaintiff not to call you,  
3 is that right?

4 MS. AGUIAR: Objection, your Honor.

5 THE COURT: Sustained. You were here last week and  
6 you're here today, correct?

7 THE WITNESS: Yes.

8 THE COURT: Next.

9 Q. When did you begin working in Fresh Del Monte?

10 A. I began working in Fresh Del Monte in June 2003.

11 Q. What was your position when you began?

12 A. My position was vice president of fresh cut sales and  
13 operations.

14 Q. And you became senior vice president when?

15 A. June 2005.

16 Q. Sir, you would agree that of the brands that you deal with  
17 in your capacity as senior vice president, the most valuable  
18 brand that you have is the Del Monte label, correct?

19 A. Yes, it is.

20 Q. And you would agree that it's extremely available to your  
21 company, correct?

22 A. It is valuable, yes.

23 Q. For example, if you were to learn that tomorrow some other  
24 companies put Del Monte stickers on fruit, putting them in the  
25 stores without your permission, you'd be all over that,

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1 wouldn't you?

2 A. Yes, we would be.

3 Q. You wouldn't tolerate that for a minute, would you?

4 A. No, I would not want to tolerate that.

5 Q. Now, sir, you received weekly reports as part of your job  
6 duties, is that right?

7 A. Yes, I do.

8 Q. And how long have you been receiving those weekly reports?

9 A. Actually, probably since June of 2005.

10 Q. And if someone were to say in one of those weekly reports  
11 hey, we just saw a store in Kansas with our Del Monte stickers  
12 on fresh fruit and it's not our fruit, you would immediately  
13 take action to stop that, wouldn't you?

14 A. Yes, probably so, yes.

15 Q. You're not going to let people sell fruit that's not yours  
16 with Del Monte stickers, are you?

17 A. We're not going to let people sell fruit with Del Monte  
18 stickers that's not ours, that's correct. You're talking whole  
19 fruit.

20 Q. Yes, sir, whole fresh fruit right off the tree.

21 A. Right.

22 Q. Now, sir, in the course of your work at Del Monte, you have  
23 lots of meetings with senior management folks, correct?

24 A. Yes, I would say we do meet often.

25 Q. And one of the things that you talk about is what is being

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1 sold out in the market that you're in, in the refrigerated  
2 section of the fresh fruit of the stores, correct?

3 A. I wouldn't say I would characterize it as talking about  
4 what's being sold at the markets. They're usually about what  
5 we sell and what we do, the performance, they're a very high  
6 level and such.

7 Q. Don't you also talk about what your competitors are up to?

8 A. In a general sense, sometimes yes, but we focus on what we  
9 do and we want to do it well.

10 Q. Understood, but if you get reports back from the people out  
11 in the field that your competitors are putting new products in  
12 the refrigerated section of the produce department, that is  
13 something you'll want to discuss with your other senior  
14 management folks, true?

15 A. Yes, if it's in the refrigerated section, fresh cut  
16 products. Is that what you're asking?

17 Q. That's what I'm asking.

18 A. Yes, we would probably venture to talk about it, but at  
19 this point in time, though, my job as senior vice president  
20 sales and product management and marketing is for the whole  
21 products.

22 Q. Understood, and that includes whatever's sold in the  
23 refrigerated section of the produce department, correct?

24 A. That does not include fresh cut products that are sold in  
25 the refrigerated section.

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1 Q. So you're telling me that your current position has nothing  
2 whatsoever to do with what is being sold in the refrigerated  
3 part of the produce?

4 A. Well, it does -- if it's classified as a whole fresh fruit  
5 product, so if it's a tomato or an avocado or an apple or  
6 grapes or such, yes, but if it's a fresh cut fruit product,  
7 that doesn't come under my domain.

8 Q. Whose domain would that be?

9 A. Paul Rice. He's the senior vice president of operations  
10 for North America.

11 Q. And when you have senior management meetings, Mr. Rice  
12 attends these meetings as well, doesn't he?

13 A. Yes.

14 Q. In fact, let me give you a specific example that the jury  
15 has seen. Can we see Exhibit 509, please? I'm going to take  
16 you to page 872. Andrew, would you show the cover page just to  
17 remind the witness and the jury? You remember this  
18 presentation, don't you, the 2006 plan presentation that took  
19 place on November 11, 2005?

20 A. I was there, yes. I don't remember the whole book, no.

21 Q. Fair enough, but you were at the meeting.

22 A. Yes, I was.

23 Q. All right. Now, Andrew, please turn to page 872. That  
24 would be you there?

25 A. That is me.

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1 Q. And go back, Andrew, to the full. So you were at the top  
2 of this organizational chart for N.A. sales, N.A. meaning North  
3 America, correct?

4 A. Well, this is just the whole products, so if you look  
5 closely you see it mentions bananas and pines and melons, the  
6 citrus fruit and so on. It does not mention fresh cut. So  
7 fresh cut does not come under my direction.

8 Q. But everything else does?

9 A. On the whole side, yes.

10 Q. And because you were in charge of the entire whole fresh  
11 operation as you put it, you had meetings where other senior  
12 people are present where you discussed strategy for the  
13 company, correct?

14 A. Occasionally, yes.

15 Q. And that is in fact what was going on at this meeting, were  
16 you talking about strategy for the year 2006, right?

17 A. That was part of it, yes.

18 Q. And do you recall that there was discussion at this meeting  
19 about the Del Monte label?

20 A. I don't recall.

21 Q. Now, you obviously used the Del Monte label on everything  
22 that's sold under your jurisdiction, right?

23 A. Almost everything, yes.

24 Q. What don't you use it on?

25 A. On any secondary product quality that doesn't make the

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1 grade, so to speak. So if it's not the best quality we  
2 wouldn't put the Del Monte shield on it.

3 MR. GONZALEZ: Could you go to page 608?

4 Q. At the very top, sir, you see it says Del Monte primary  
5 brand, which you and I have agreed to, correct?

6 A. Yes. I see that.

7 Q. And then it says limited to fresh produce. Do you see  
8 that?

9 A. I do see that.

10 Q. In all of the years that you have been at Del Monte, that  
11 is how you have been operating using the Del Monte brand only  
12 with fresh produce, correct?

13 A. The years that, what I know is that as long as I've been at  
14 Del Monte since 2003 we've used the brand on fresh produce yes.  
15 But what we can use it on, I don't know. I can't go there.

16 Q. I didn't ask you that, but I'm going to. When you were the  
17 vice president of sales when you started that position, you  
18 were in that position for two years, right?

19 A. That's correct.

20 Q. And in those two years you were responsible for fresh cut,  
21 correct?

22 A. I was responsible for fresh cut, yes.

23 Q. Now, during those two years, when you were responsible for  
24 fresh cut sales, you knew then that it was very important to  
25 protect the brand, right?



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1 A. Yes.

2 Q. If anybody was, got a step on your turf then would you take  
3 immediate steps to stop them, correct?

4 A. It depends what you mean step on our turf and what steps I  
5 could take.

6 Q. Let me be more clear. When you were vice president of  
7 sales for the entire fresh cut operation of the company, if you  
8 believed that a company was using the Del Monte brand  
9 improperly, you would have said something, correct?

10 A. I would have told my superior, yes.

11 Q. You would have demanded that they take action to stop it,  
12 true?

13 A. I can't demand something of my superior.

14 Q. Well, wouldn't you have told your superior that we need to  
15 take steps to stop this, this is wrong?

16 A. I would have discussed it with him but I don't remember  
17 specific discussions.

18 Q. So let's talk about Orchard Select. When you joined the  
19 company in June of 2003, you knew that my company was selling  
20 Orchard Select pineapple in the refrigerated part of the  
21 produce department, true?

22 A. I have a recollection of that, yes.

23 Q. Now, when you learned that, did you tell my client, Del  
24 Monte, you can't do that, you can't sell pineapple in the  
25 refrigerated part of the store with a Del Monte label?

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1 A. Well, I didn't say that, no. I didn't tell your client  
2 anything.

3 Q. You didn't ask anybody to, did you?

4 A. I didn't ask anybody specifically, but I'm sure I talked to  
5 Paul Rice about it at the time who I reported to.

6 Q. Do you understand, sir, that your employer is taking the  
7 position in this case that my client cannot sell any pineapple  
8 in the refrigerated part of the store. Do you understand that?

9 A. Yes.

10 Q. You not only knew that we were selling Orchard Select, but  
11 you knew that we were selling other lines of products when you  
12 were vice president, true?

13 A. Yes, I did.

14 Q. And what are the products you knew that we sold in the  
15 refrigerated part of the produce section?

16 A. I knew you were selling the -- it wasn't in all the stores  
17 but you were selling some Fruit Naturals, if I recall correctly  
18 and some ready to eat Fruit Bowls, grapefruit and so forth, and  
19 yes, there was a concern, because it was extremely confusing  
20 for the consumer. The consumer sees the same brand or shield  
21 on the product and they don't know which is preserved or which  
22 is fresh cut. So it was an issue.

23 MR. GONZALEZ: Your Honor, I'm going to move to strike  
24 the part of the answer about what the consumers knew or what  
25 their confusion was. It's not what I had asked him.

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1 THE COURT: Was that your belief at the time that it  
2 was extremely confusing to the consumer?

3 THE WITNESS: Yes.

4 THE COURT: I'll allow it in on that basis as opposed  
5 to any particular knowledge.

6 MR. GONZALEZ: Thank you, your Honor.

7 Q. So you also knew that my client was selling, and this is  
8 back when you were vice president of sales in June 2003 to  
9 June 2005, you also knew that my client was selling SunFresh in  
10 the refrigerated part of the store, true?

11 A. Yes, I recall SunFresh.

12 THE COURT: Did you know that Orchard Select contained  
13 pineapple at that time?

14 THE WITNESS: I actually don't remember it containing  
15 pineapple. I remember Orchard Select peaches or such.

16 THE COURT: All right.

17 Q. The Fruit Naturals that you recall in the refrigerated  
18 section, you do recall that some of those included pineapple  
19 and some of those included papaya?

20 A. I do recall some of them included pineapple. I don't  
21 recall papaya at all.

22 Q. And the SunFresh products that you were selling in the  
23 refrigerated part of the produce department, you knew that some  
24 of those included pineapple and/or papaya, true?

25 A. I knew some of them contained pineapple. I don't remember

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1 papaya specifically.

2 Q. And so even though you knew that we were selling pineapple  
3 in the refrigerated part of the store, you didn't do anything  
4 to try to stop my client from selling it, didn't you?

5 A. Well, it wouldn't have been my job to do that. I informed  
6 my superior Paul Rice of the issue.

7 Q. Did you ever tell anyone that they should stop us from  
8 selling pineapple in the refrigerated part of the store because  
9 we didn't have a right to do that?

10 A. I don't think I told anyone -- I don't recall what I told  
11 them, actually. I mean, I don't remember. That was a long  
12 time ago.

13 Q. Let's get this straight. What exactly do you recall saying  
14 to Mr. Rice about the fact that my client was selling multiple  
15 products with pineapple in the refrigerated part of the store  
16 while you were vice president?

17 A. The specific verbatim, I don't recall the language.

18 THE COURT: In general. Words or substance. I take  
19 it, sir, you can't recall the words.

20 THE WITNESS: Right.

21 THE COURT: In general. In substance.

22 A. In substance, the issue, the discussion was my concern that  
23 the products that Del Monte Corporation was bringing into the  
24 produce department was having an issue with our products. It  
25 was taking shelf space and there's limited shelf space in the

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1 refrigerated case, so with that in mind and the issue, quite  
2 frankly, is that it was confusing the consumer and eating into  
3 our sales, so to speak.

4 Q. All right.

5 A. And I'm sure the conversation was about that.

6 Q. Okay. You just said two things. Number one, confusion to  
7 consumers and number two, we're cutting into your shelf space.  
8 That's what you talked to your boss about, right?

9 A. I talked to my boss about probably, yes, both those things.

10 Q. You did not say to your boss, hey, they don't have the  
11 right to sell that stuff there. You did not say that, did you?

12 A. I did not sell that because I don't know what rights they  
13 have.

14 Q. And when you talked to your boss, your boss didn't say that  
15 to you either, did he?

16 A. He didn't -- I don't recall what he said at the time.

17 Q. You don't recall anybody saying at any of these senior  
18 management meetings that you were having back in 2003 to 2005  
19 when you're talking about our products are taking your space,  
20 you don't recall anybody in your company saying hey, wait, they  
21 can't sell pineapple there? You don't recall anybody saying  
22 that, do you?

23 A. I don't think I said it in that context. I don't recall  
24 specific conversations. I mean, that was seven years ago, and  
25 so --

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1 Q. You -- I'm sorry, are you finished?

2 THE COURT: Do you recall any specific conversations  
3 at or about that time concerning the sale of cut pineapple by  
4 Del Monte Corporation?

5 THE WITNESS: I remember, as I said, talking to Paul  
6 Rice about my concern about pineapple from Del Monte  
7 Corporation making inroads into the produce department.

8 THE COURT: In terms of shelf space?

9 THE WITNESS: In terms of shelf space, yes.

10 Q. But nobody ever said, as you're having this discussion with  
11 this person -- I assume you discussed this concern with others  
12 too, true, within the plaintiffs -- between your employer?

13 A. I think I probably talked to a few people about it. Maybe  
14 a general manager or Kirk Teske or such.

15 Q. And what was Kirk Teske's position? He was -- do you  
16 remember?

17 A. During the time when I was VP of sales for fresh cut?

18 Q. Yes.

19 A. He was general manager for Kankakee.

20 Q. And Mr. Teske was the person who was here in court?

21 A. That's correct.

22 THE COURT: He's in the first row, right?

23 THE WITNESS: Yes, he is in the first row.

24 Q. So what concerns did you express to Mr. Teske about our  
25 products being refrigerated? Was it the same thing, that we're

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1 taking shelf space?

2 A. I'm not trying to be rude, sincerely. I just don't  
3 remember exactly what the conversations were. But again, in a  
4 general term, I remember having conversations and being  
5 concerned about it.

6 Q. About shelf space being taken, true?

7 A. About the whole context of Del Monte Corporation's  
8 preserved product being in the refrigerated case.

9 Q. You never told Mr. Teske that you thought our products  
10 being there was in violation of the contract, you never said  
11 that, did you?

12 A. I never said that, because I'm not familiar with the  
13 contract.

14 Q. And when you had the conversation with Mr. Teske, he never  
15 said to you, well, wait a minute, they can't sell pineapple in  
16 the refrigerated part of the produce section, he didn't say  
17 that to you, did he?

18 A. He didn't say that to me, no.

19 Q. And when you're having this meeting in November of 2005,  
20 who is it that's talking about the Del Monte brand limited to  
21 fresh produce? Who is making the presentation?

22 A. I think John Lockridge made this part of the presentation,  
23 but I'm not sure.

24 Q. I'm sorry, what's John's last name?

25 A. Lockridge.

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1 Q. Does he still work for you?

2 A. No, he doesn't.

3 Q. And when Mr. Lockridge made this presentation that included  
4 an assertion that Del Monte's brand is limited to fresh  
5 produce, you don't recall anybody standing up and objecting to  
6 that, do you?

7 A. I don't recall this particular slide, let alone that.

8 Q. You don't recall there being any discussion at this meeting  
9 about the fact that my client could not sell pineapple in the  
10 refrigerated part of the produce section, you don't recall that  
11 being discussed at all, do you?

12 A. I don't recall anything being discussed about this area.

13 Q. And let me just focus on my question for a minute. I  
14 appreciate your recollection is not great about the meeting,  
15 you've told us that. Do you have any recollection of anyone at  
16 the meeting at any time, whether it's this slide or some other  
17 slide, do you have any recollection of anybody saying, wait a  
18 minute, Del Monte can't sell pineapple in the refrigerated part  
19 of the store? Did anybody say that?

20 A. Not that I'm aware of.

21 Q. When did you hear for the first time that your client is  
22 asserting that my client cannot sell pineapple in the  
23 refrigerated part of the store?

24 A. Sometime in, think it was sometime in 2008.

25 Q. Sometime in 2008.



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1 A. Yes.

2 Q. That's when this lawsuit was filed, do you know that?

3 A. Yes.

4 Q. And how did it come to you?

5 MS. AGUIAR: Object just to the extent that it might  
6 call for a privileged communication.

7 THE COURT: Don't discuss anything lawyers said to  
8 you.

9 A. Our in-house counsel came to me with it.

10 Q. Was this after this lawsuit was filed?

11 A. I don't recall.

12 THE COURT: What date was the lawsuit filed?

13 MR. GONZALEZ: I believe it was October of 2008.

14 THE COURT: Sir, do you know whether it was before or  
15 after October of 2008 that an attorney came to you? You may  
16 not know.

17 THE WITNESS: I don't recall.

18 THE COURT: All right.

19 Q. Sir, when you were vice president of fresh cut sales, one  
20 of your responsibilities was to determine whether there were  
21 new products that you could sell, true?

22 A. No.

23 Q. That isn't something that you participated in, deciding  
24 what new products you might want to put on the market?

25 A. No, it wasn't. I came on in 2003 and specifically for the

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1 sales function of the existing products we had. Del Monte just  
2 got finished building out eight facilities and these facilities  
3 were not being utilized totally. The sales were lackluster and  
4 my specific job for those two years was really to focus on the  
5 products that we had and promote them with retailers and  
6 promote the product line. And that was really my focus. I  
7 wasn't involved really on the operational side and new product  
8 development really didn't come into play.

9 Q. When you had meetings with other senior executives at Fresh  
10 Del Monte, didn't you talk about new products? Maybe not you  
11 personally. Wasn't there discussion about new products that we  
12 might want to put on the market?

13 A. I don't recall specifically about new products being put on  
14 the market.

15 Q. In all of the years that you've been at Fresh Del Monte,  
16 every single product that you sell, meaning the company, with  
17 the Del Monte logo, is a fresh product, true?

18 A. To the best of my knowledge, the years that I've been there  
19 all the products that we sell are fresh products.

20 Q. What you told us in deposition is that during the years  
21 you've been there you haven't even considered using the Del  
22 Monte shield on something that's not fresh, correct?

23 A. Well, it didn't come under me because new product  
24 development wasn't under me.

25 Q. And is that why you didn't consider it?

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1 A. I'm not -- am I speaking for the corporation? I can't  
2 speak specifically for the people in charge of new product  
3 development.

4 Q. Do you recall telling me at deposition, telling us at  
5 deposition that the reason why you didn't consider it was  
6 because you couldn't under the contract use the Del Monte label  
7 on products that were not fresh? Do you recall saying that?

8 MS. AGUIAR: Objection, your Honor. This goes to the  
9 voir dire we had the other day.

10 MR. GONZALEZ: At this point it's impeachment.

11 THE COURT: Just a moment.

12 (Pause)

13 THE COURT: I'll allow it. Do you recall saying it,  
14 yes or no?

15 THE WITNESS: I'm sorry, can you repeat the question?

16 Q. Yes. When we asked you why you've only used the Del Monte  
17 shield on fresh product as opposed to processed or preserved,  
18 do you remember telling us in deposition that you didn't use  
19 it, didn't even consider using it on preserved product because  
20 you couldn't under the agreement?

21 A. I don't recall.

22 MR. GONZALEZ: Your Honor, I'd like to read from 132,  
23 line 13 through 133, line 3.

24 MS. AGUIAR: Just give me a moment to look at it.

25 (Pause)

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1 Q. Sir, I'm going to read --

2 THE COURT: Do you recall being asked this question  
3 and giving this answer at a deposition, sir?

4 THE WITNESS: Starting with?

5 THE COURT: Well, Mr. Gonzalez will read it.

6 Q. I'll read it, sir, and just for the record, sir, the  
7 deposition was taken on March 25, 2010. I'm beginning at page  
8 132, line 13.

9 "Q. In the past has fresh Del Monte considered selling  
10 processed and preserved cut fruit items like the types of  
11 processed and preserved cut fruit items like Del Monte  
12 Corporation sells?

13 "A. In North America?

14 "Q. In North America.

15 "A. The only one I'm aware of in the past is the Rosy slightly  
16 processed product line -- I'm sorry, product that I mentioned  
17 earlier.

18 "Q. Has fresh Del Monte in the past considered selling any of  
19 these types of processed and preserved cut food items in North  
20 America under the Del Monte brand?

21 "A. No.

22 "Q. Why not?

23 "A. Because of the license agreement."

24 Do you see that?

25 A. Yes, I do.

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1 Q. Did I read it correctly?

2 A. Yes.

3 Q. Did you have an opportunity to review your testimony?

4 A. I had an opportunity to review it and I did so, and I was  
5 under the understanding there were typos and so forth. I  
6 didn't think I could change the testimony.

7 Q. Well, you made a number of changes to your testimony to  
8 correct the testimony, is that right?

9 A. They were all grammar and typos and such.

10 Q. You didn't change this?

11 A. I didn't change this for the content.

12 THE COURT: In other words, was it your understanding  
13 that the review was for purposes of typos and grammar and not  
14 for purposes of substance?

15 THE WITNESS: That's what my understanding was.

16 THE COURT: All right.

17 Q. Are you telling me now this is a mistake, the court  
18 reporter made a mistake?

19 A. I'm not saying the court reporter made a mistake.

20 Q. You knew this was an important deposition, didn't you?

21 A. Yes, I knew it was an important deposition.

22 Q. And when you sat for it you sat as senior vice president  
23 for your company correct?

24 A. That was my position, yes.

25 Q. And you knew it was important to tell the truth?

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1 A. Absolutely.

2 Q. And you knew it was important not to guess or speculate,  
3 right?

4 A. Well, I was speaking under the context of my knowledge, and  
5 I mentioned the license agreement, but I've never read the  
6 license agreement, so I was under the assumption at that time  
7 that, that this was the reason. But again, I never read the  
8 license agreement, so I didn't really know.

9 Q. Well, you didn't just take a wild old guess in your  
10 deposition, did you?

11 A. Well, what I did is, I speculated, obviously, that we  
12 didn't, we didn't do it and the reason is, is what I stated,  
13 but again, I don't understand -- I don't -- I've never read the  
14 license agreement to understand it.

15 Q. But you've sat in a number of important management meetings  
16 at your company where everybody talked about the fact that you  
17 could only use the Del Monte label on fresh produce, isn't that  
18 right?

19 A. No, that's not right.

20 Q. Well, did you see the document I just put up there where  
21 the entire management was talking about strategy and it says  
22 limited to fresh produce? Did you see that?

23 A. The document you put up there was well over 200, 300 pages.  
24 I'm not sure. It was a meeting that lasted for nine to ten  
25 hours and it was one of six, five or six days of meetings that

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1 occurred. So I don't recall what was said, but to say that, I  
2 don't think we can say that.

3 Q. All right. Let's get a couple of things clear. When you  
4 say at deposition under oath that you've never even considered  
5 selling preserved product using my client's brand, that it was  
6 because of the license agreement, the license agreement is the  
7 contract that we're here for, true?

8 A. That's part of the reason, yes.

9 Q. What did you base that answer on? If you hadn't read the  
10 contract, isn't it true that you based that answer on the  
11 course of conduct of your company since you began working there  
12 in 2003?

13 A. No, not at all. Because what I based that answer on was  
14 what I've done and what I did to that time -- in that time  
15 frame. So as I said earlier, my focus when I joined the  
16 company was in the fresh cut products that we had and  
17 subsequent to that on the whole fresh products, so that's what  
18 it was all based on.

19 Q. You're familiar with the Rosy brand?

20 A. Yes.

21 Q. You would agree with me hands down that the Del Monte label  
22 is far more valuable than this Rosy label?

23 A. Yes, I would.

24 Q. You would agree that if this bucket had the Del Monte  
25 brand, you'd be able to sell a lot more of this stuff?

C42FFRE4

Lazopoulos - direct

1 A. If that bucket had the Del Monte brand?

2 Q. Yes.

3 A. Yes, we probably would be able to sell a lot --

4 THE COURT: What exhibit number do you have?

5 MR. GONZALEZ: Thank you, your Honor. 255.

6 Q. Tell us, by the way, who is the person who decided that  
7 we're going to call this Rosy instead of Del Monte?

8 A. I don't know that.

9 Q. And why is it that it's called Rosy and not Del Monte?

10 A. I don't know why it was decided to call it Rosy instead of  
11 Del Monte. I wasn't involved in the product development of  
12 that product.

13 Q. Do you recall telling us something different at deposition?

14 A. I recall saying something different at deposition, but I  
15 don't remember specifically what it was.

16 MS. AGUIAR: Your Honor, can we --

17 MR. GONZALEZ: It's impeachment again, your Honor.

18 Q. Do you recall telling us at deposition the reason that it  
19 says Rosy and not Del Monte is because the contract doesn't let  
20 you say Del Monte because it's preserved?

21 THE COURT: I'll allow it.

22 A. I'm sorry, could you repeat that?

23 Q. When you were asked at deposition why is this called Rosy  
24 and not Del Monte, you didn't say, "I don't know." What you  
25 said was is that under the contract we can't call it Del Monte



C42FFRE4

Lazopoulos - direct

1 because it's preserved. Isn't that what you told us?

2 A. I said something to that extent, but I don't remember  
3 specifically.

4 THE COURT: Had you read the contract at that time?

5 THE WITNESS: No. I have not -- I still haven't read  
6 the contract. I don't have a copy of it and I haven't read it.

7 Q. So, tell me, if it is your employer's position that you can  
8 sell pineapple even if it's processed or preserved using Del  
9 Monte's brand, if that is in fact true, then why haven't you  
10 done it in 23 years?

11 A. I can't answer that.

12 Q. Why haven't you done it since you started there?

13 A. Because that hasn't been my focus, as I said.

14 MR. GONZALEZ: Your Honor, for impeachment purposes,  
15 I'd like to read from page 120, line 17 to 22. One question,  
16 one answer.

17 THE COURT: Is there an objection?

18 (Pause)

19 MR. GONZALEZ: Your Honor, I'm going to read the  
20 question and answer that I'd like to read and one more question  
21 and answer that counsel has asked me to read. Andrew, could  
22 you please put up page 120, lines 17 to 22?

23 "Q. Can you explain why fresh Del Monte sells these products  
24 under the Rosy brand instead of the Del Monte brand?

25 "A. In North America we are not allowed to use the Del Monte

C42FFRE4

Lazopoulos - direct

1 brand label on any type of preserved product."

2 Do you see that?

3 A. Yes, I do.

4 Q. You didn't change or correct that answer when you read your  
5 transcript, did you?

6 A. I did not.

7 Q. That was your belief at the time, correct?

8 A. That was my personal belief, yes.

9 Q. And that belief was based at least in part on the many  
10 conversations you've had with people at Fresh Del Monte,  
11 correct?

12 A. Not at all.

13 Q. So what was it based on?

14 A. It was based on the fact that when I joined the company we  
15 were just doing fresh products, as I said. And there was -- my  
16 total focus was selling the products that we had and when this  
17 preserved product came into play, I wasn't involved in the  
18 product development of it, the development. My focus was on  
19 the fresh, fresh products only, and I didn't know that the, I  
20 didn't know about the contract other than that there was one.  
21 Specifically about the contract.

22 Q. Sir, isn't it true that the reason you never took any steps  
23 to stop my client from selling pineapple in the refrigerated  
24 part of the produce section is because you always understood  
25 that we could do that?

C42FFRE4

Lazopoulos - direct

1 A. No, that's not true.

2 Q. Then why didn't you take steps to stop us?

3 THE COURT: Sustained.

4 MS. AGUIAR: And also, I didn't want to interrupt your  
5 flow, but you said you'd read the other question and answer.

6 MR. GONZALEZ: Andrew, can we display page 121, lines  
7 1 and 2 and line 23?

8 "Q. Is there someone that knows more about the Rosy brand than  
9 you do?

10 "A. Tom Young and Kirk Teske."

11 Q. And again, Mr. Teske is the gentleman in the court who  
12 already testified?

13 A. Yes.

14 Q. Does Tom Young still work for you?

15 A. Yes, he does.

16 Q. So if you had to find out more about the Rosy brand, he's  
17 the guy you would talk to?

18 A. Yes.

19 MR. GONZALEZ: Andrew, can we go back to Exhibit 509  
20 briefly and go to page 5600.

21 Q. This is the same strategy meeting that I showed you about  
22 earlier what it says, this one says, this page, page 600, using  
23 the Bates number says under weaknesses, brand license  
24 limitations. Do you see that?

25 A. Yes, I do.

C42FFRE4

Lazopoulos - direct

1 Q. That is a reference to what you referred to earlier, that  
2 you could only use the Del Monte brand with fresh products,  
3 correct?

4 A. Could you repeat that?

5 Q. Yes. When this says weaknesses, brand license  
6 limitations --

7 THE COURT: Do you know what that was referring to?

8 THE WITNESS: No, I don't. I don't recall this  
9 particular slide, either. I'm not sure what they were  
10 referring to.

11 Q. Well, at that time, what brand license limitations were you  
12 aware of with respect to the Del Monte shield?

13 A. I wasn't aware of our limitations at all. I didn't know  
14 what our limitations were.

15 Q. Well --

16 THE COURT: But you knew, you were putting out, Fresh  
17 was putting out some products with the Del Monte shield, right?

18 THE WITNESS: On the whole side, sir?

19 THE COURT: Yes.

20 THE WITNESS: Yes.

21 THE COURT: And were you putting out fresh cut produce  
22 under the Del Monte shield at that time?

23 THE WITNESS: Yes, we were.

24 THE COURT: And you knew there was another company,  
25 Del Monte Corporation, that was putting out cut product under

C42FFRE4

Lazopoulos - direct

1 its, under the Del Monte shield, correct?

2 THE WITNESS: That's correct.

3 THE COURT: Did you have an understanding as to what  
4 they could do versus what you could do?

5 THE WITNESS: I had an understanding in my own mind.  
6 As I said earlier, that we were fresh and they were preserved,  
7 and that was the basis of my understanding.

8 THE COURT: All right.

9 Q. And at the time that I took your deposition you had that  
10 same understanding then, didn't you?

11 A. At the time of my deposition, I had that basis of  
12 understanding then. But I did not know at the time how far we  
13 could go with our brand.

14 Q. But when you were shown these words, these highlighted  
15 words in deposition, "brand license limitations" in deposition,  
16 you had an understanding then as to what the words meant, isn't  
17 that right?

18 A. I don't recall, actually.

19 Q. Well, do you recall telling us at deposition that you  
20 understood those words to mean that you couldn't use the Del  
21 Monte shield if the product were processed or preserved?

22 A. I don't recall. That was a few years ago.

23 MR. GONZALEZ: Your Honor, may I just show him to  
24 refresh his recollection?

25 THE COURT: Yes, show him. Just because there are

C42FFRE4

Lazopoulos - direct

1 certain words that you're going to read to yourself now doesn't  
2 mean that it refreshes your recollection, but it may.

3 Q. Sir, I'm going to ask you to read to yourself one question,  
4 one answer from page 130, lines 6 through 10 of the deposition  
5 before I ask you a question.

6 MS. AGUIAR: You'll need to read from line 1 to fully  
7 understand the question and answer.

8 MR. GONZALEZ: Not a problem.

9 Q. Why don't you read from line 1 to 10?

10 THE COURT: To yourself.

11 (Pause)

12 A. Just to line 10?

13 Q. You can stop at line 10. You're welcome to read more, but  
14 that's all I need you to read.

15 Sir, having read this, does it refresh your recollection  
16 that at the time of the deposition you had an understanding  
17 that the words that are highlighted, "brand license  
18 limitations" referred to the fact that Fresh could not put the  
19 Del Monte logo on any processed or preserved products?  
20 Correct?

21 A. That's what I said. But before that I prefaced it with the  
22 fact that I didn't know. I didn't recall that and I did not  
23 know.

24 Q. What you said --

25 A. What was discussed at the meeting.

C42FFRE4

Lazopoulos - direct

1 Q. What you said before that was that you couldn't remember  
2 specifically what was said about those words, right?

3 A. That's correct.

4 Q. But then when you were asked at deposition what is your  
5 understanding as to what those words mean, that's when you gave  
6 the answer that it was your understanding that it meant --

7 MS. AGUIAR: Your Honor. Objection. May we approach,  
8 because he's totally mischaracterizing --

9 THE COURT: Yes, sidebar. Sidebar. Counsel, counsel.  
10 I've forgotten the mid-afternoon break. Ladies and  
11 gentlemen, ten take minutes. I apologize.

12 (Jury excused)

13 (Continued on next page)

C42FFRE4

Lazopoulos - direct

1 (In open court; jury not present)

2 THE COURT: What's the issue?

3 MS. AGUIAR: My objection is that he asks --

4 THE COURT: If you would step outside, sir, you can  
5 take a break, too.

6 THE WITNESS: Okay.

7 THE COURT: Does somebody have an extra copy of that  
8 page for me?

9 MR. GONZALEZ: Your Honor, we put it up on the screen  
10 as well, if it's easier.

11 THE COURT: Okay.

12 MS. AGUIAR: So he's asked what that refers to and he  
13 says I don't know what his point was and he doesn't know what  
14 he went into.

15 THE COURT: You're talking about, is the reference  
16 before to brand license limitations on the slide?

17 MS. AGUIAR: It is, yes.

18 THE COURT: Which he has no recollection of the  
19 conversation of.

20 MS. AGUIAR: Right and he says do you know what that  
21 refers to. I don't know what his point was. And he's trying  
22 to --

23 THE COURT: Wait, I don't know what his point was,  
24 that is, whoever was talking about brand license limitations in  
25 the conversation he has no recollection of, is that correct?



C42FFRE4

Lazopoulos - direct

1 MS. AGUIAR: Yes.

2 THE COURT: All right. "When he talked about that,  
3 but we have license limitations on our brand. How far he went  
4 into that, I don't know, in the context of this planning  
5 document." All right, now what is -- Mr. Gonzalez, what did  
6 you --

7 MR. GONZALEZ: Your Honor, I don't even remember where  
8 I got cut off.

9 THE COURT: What is your question going to be?

10 MR. GONZALEZ: I don't even know that there's a  
11 question pending. I think counsel got up and objected and I  
12 said to her off the record when I went by, she complained that  
13 I was mischaracterizing what he said, so my view is, look, if  
14 they want to read it then they can read it, then there's no  
15 question about my mischaracterizing it.

16 The whole reason why I approached him is so I'm  
17 avoiding the argument that I'm mischaracterizing in any way.  
18 What happened here, your Honor, is the witness' answers have  
19 changed dramatically between his deposition and his trial  
20 testimony.

21 THE COURT: But as I understand it, he has a  
22 consistent response for it. That is, he has no specific  
23 recollection of the discussion if any and he was off the  
24 reservation in the sense that he -- I never read the license  
25 agreement. That statement here is a consistent statement.

C42FFRE4

Lazopoulos - direct

1 MR. GONZALEZ: But the jury is entitled to disbelieve  
2 what he's saying.

3 THE COURT: Absolutely.

4 MR. GONZALEZ: He's in all these meetings and saying  
5 all these things.

6 THE COURT: I understand, that's the nature of  
7 impeachment, but what is the issue we have before us at this  
8 moment that calls for a judicial decision?

9 MR. GONZALEZ: I have no issue.

10 THE COURT: Ms. Aguiar?

11 MS. AGUIAR: I believe he was saying to the witness  
12 and there was a question pending -- I'm sorry I'm trying to  
13 scroll up, so I'm sorry --

14 THE COURT: Take a moment, do the scrolling. Take a  
15 moment, do the scroll up. Let me do the same.

16 MS. AGUIAR: It says -- he asked him and this is right  
17 when I objected so absolutely, this is when you asked the  
18 question, so I put in an objection --

19 THE COURT: What page? What line?

20 MS. AGUIAR: I can give you the time.

21 THE COURT: You don't have pagination on the left?

22 MS. AGUIAR: No.

23 THE COURT: Go ahead.

24 MS. AGUIAR: Question: "But when you were asked at  
25 deposition what is your understanding as to what those words

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Lazopoulos - direct

1 mean that was your, that is when you said it was your  
2 understanding that it meant" -- that's when I objected because  
3 I think he was trying to suggest to the witness that the  
4 witness knew what those words in this presentation meant and  
5 his testimony has been consistent, your Honor, which is that,  
6 and this was the whole voir dire the other day and your words  
7 were, look, the guy didn't have a basis for it. It was in the  
8 air, he didn't read the agreement, he said that.

9 You told Mr. Gonzalez that he could ask all his course  
10 of conduct questions. Now we've gone well beyond that. I  
11 appreciate your ruling. I made my objection based on your  
12 prior ruling.

13 THE COURT: Given the answers I thought it was  
14 appropriate impeachment, and it's come out now as is  
15 appropriate that he had never read the license agreement. So  
16 what can I do for you now? You have, it seems to me that  
17 Mr. Gonzalez on the record now has appropriate impeachment  
18 based on his answers on direct here that he said what he said  
19 at the deposition, and you have his consistent response here  
20 that he had never read the license agreement. He doesn't know  
21 what it said.

22 MS. AGUIAR: I understand that.

23 THE COURT: So you each have your arguments.

24 MS. AGUIAR: I understand that, and I believe that the  
25 issue that I'm raising is twofold, that the question was

C42FFRE4

Lazopoulos - direct

1 objectionable for the reasons I just described and that I don't  
2 believe that this is coming up again as proper impeachment,  
3 because he has said, look, I didn't read the agreement, I don't  
4 know, and so I just think -- that's the nature of my objection  
5 is twofold and -- I was just being whispered to. I'm sorry.

6 THE COURT: No, of course, talk to each other.

7 MS. AGUIAR: And of course Mr. Kennedy is making a  
8 perfectly valid point about 403. I think he's trying to paint  
9 this witness as someone who needs to be impeached again and  
10 again and again on the same point. And you raised the point,  
11 look, it doesn't help the jury to hear, first off, that it was  
12 just in the air and the guy doesn't really know, he hasn't read  
13 the agreement, so the jury heard fine, it was in the air, he  
14 thought it --

15 THE COURT: You've been able to establish, well, you  
16 haven't established but it's been established from this witness  
17 that he's never read the agreement and he hasn't responded  
18 directly to Mr. Gonzalez. As a matter of fact, he's fought Mr.  
19 Gonzalez on the issue of, well, in your conversations with  
20 other high-level management didn't this come up and essentially  
21 he said no, I focus on selling my product. I don't worry about  
22 what the other guys are doing and I never read the license  
23 agreement. I repeat, what is it at this point that you want?

24 MR. GONZALEZ: For the record --

25 MS. AGUIAR: Mr. Gonzalez has told me he will withdraw

C42FFRE4

Lazopoulos - direct

1 the question, so that takes care of my first issue.

2 THE COURT: Fine. Okay.

3 MS. AGUIAR: And my second issue is I think at some  
4 point it is prejudicial.

5 THE COURT: I think Mr. Gonzalez is done with this.

6 MS. AGUIAR: So if he does anything more with that --

7 THE COURT: I agree.

8 MR. GONZALEZ: So do I. That was my last question.  
9 She objected. I told her I'll withdraw it. I'm going on to  
10 another topic.

11 MS. AGUIAR: So I can be clear, there's probably at  
12 least one other point in that same section of the deposition  
13 where it's the same issue, just different words where he says  
14 again --

15 THE COURT: Mr. Gonzalez, you're going to go to  
16 another section here that does exactly what Ms. Aguiar says?

17 MR. GONZALEZ: Your Honor, I feel I made the point I  
18 need to make. I'm going on to another topic. He said this two  
19 other times in the deposition, but I feel like I made my point,  
20 so I'm not going to go there. However, depending on what  
21 they're going to do, if he comes back, I may have to --

22 THE COURT: Well, let's see, I think you exhausted the  
23 area given my prior rulings, but I think with respect to his  
24 answers it was appropriate impeachment. You both have your  
25 arguments. All right, take a break.

C42FFRE4

Lazopoulos - direct

1 (Recess)

2 THE COURT: I've been looking at the feed, I don't  
3 show a question that's been asked.

4 MR. GONZALEZ: There was a question and counsel  
5 stopped me in the middle of a question.

6 THE COURT: Right. There's no question that's been  
7 asked. We're going to, I think it's probably moot in light of  
8 the fact that you're going to go on to another area.

9 MR. GONZALEZ: Yes.

10 THE COURT: But so that the record is complete, I'm  
11 going to, given the question, given my in limine ruling, I  
12 think it has been proper impeachment, but by the same token,  
13 it's quite more than enough and I'm directing you to go on  
14 under Rule 611 to another topic.

15 All right, let's bring the jury in.

16 (Continued on next page)

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23  
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25

C42FFRE4

Lazopoulos - direct

1 (In open court; jury present)

2 THE COURT: You may continue with the direct  
3 examination of Mr. Lazopoulos.

4 MR. GONZALEZ: Thank you.

5 BY MR. GONZALEZ:

6 Q. Sir, I had these two other quick areas to cover with you.  
7 Number one, since you began working at Fresh Del Monte, one of  
8 the things you do is you attend industry trade shows, correct?

9 A. Yes, that's correct.

10 Q. You've attended trade shows for the PMA, United Fresh  
11 Produce Association and the New England Produce Council?

12 A. Yes.

13 Q. And also the Southeast Produce Council?

14 A. Occasionally.

15 Q. And, sir, you've told us at deposition that you think one  
16 way that consumers can tell whether or not a product is fresh  
17 is by the best by date on the product?

18 A. Yes.

19 Q. In general, the best by --

20 A. If -- I'm sorry. If they read it.

21 Q. In general, the best by date for your products is less than  
22 14 days from the date that it comes off the production line, is  
23 that right?

24 A. It all depends on the product.

25 Q. How about the, take pineapple, fresh pineapple coming off

C42FFRE4

Laopoulos - cross

1 the production line, what's the best by date?

2 A. I don't recall right now, but it's somewhere around 12 days  
3 or 14 days.

4 Q. And you testified that in your opinion your typical  
5 consumer understands that if the best by date is more than 18  
6 days then they know it's not a fresh product, correct?

7 A. I'm sorry, could you repeat that?

8 Q. Yes. You've told us at deposition that in your view if the  
9 best by date is more than 18 days the consumer understands it's  
10 not a fresh product, correct?

11 A. I recall saying something like that, yes.

12 Q. You understand that our products in this case all have a  
13 best by date that's many months after it arrives at the store,  
14 right?

15 A. The ones that I'm familiar with, yes.

16 Q. And so it's your understanding that if a consumer reads the  
17 best by date they'll understand it's not fresh if it's many  
18 months out, correct?

19 A. If they read it.

20 MR. GONZALEZ: Thank you, your Honor. That's all I  
21 have.

22 THE COURT: All right, thank you. Any cross?

23 MS. AGUIAR: Briefly, your Honor.

24 CROSS-EXAMINATION

25 BY MS. AGUIAR:



C42FFRE4

Laopoulos - cross

1 Q. Mr. Lazopoulos, could you explain what your job duties and  
2 responsibilities have been since the middle of 2005 through the  
3 present?

4 A. My specific job duties are, again, sales, product  
5 management, which is managing the products that we have on the  
6 whole side. Again, the whole is bananas, pineapples. When you  
7 go to the grocery store in the produce department it's all the  
8 whole products you'll see, the tomatoes, the avocados and so  
9 forth.

10 In addition to that, I took on marketing in 2006 or 2007.  
11 But again, the marketing function as well as all my sales  
12 functions and so forth were specifically on the whole side.  
13 The fresh cut sales and operations side reports to Paul Rice,  
14 the senior vice president of operations for North America.

15 Q. Are you familiar with the specific terms of the license  
16 agreement in place between Fresh Del Monte and Del Monte  
17 Corporation?

18 A. No, I'm not familiar with it.

19 Q. Do you actually know what the legal rights are of each  
20 party under that license agreement?

21 A. No, I do not.

22 Q. Are you one of the people at Fresh Del Monte who is  
23 knowledgeable about the company's rights to use the Del Monte  
24 trademark?

25 A. No, I'm not. That would be our counsel.

C42FFRE4

Laopoulos - cross

1 Q. So as a business person at the company, if you want to know  
2 what the company's rights are in that regard, to whom would you  
3 go?

4 A. I would go to Philip Brazlavsky or Bruce Jordan, probably,  
5 which is our in-house counsel.

6 Q. Both Phil and Bruce are in-house counsel for Fresh Del  
7 Monte?

8 A. That's correct.

9 MS. AGUIAR: Thank you. Nothing further.

10 MR. GONZALEZ: Nothing further.

11 THE COURT: So now we go back to the plaintiff. You  
12 may call your next witness.

13 MR. DREYER: I think we're done for today, your Honor.  
14 We have Mr. Phillips, who will be our first witness tomorrow.

15 THE COURT: Why don't we end -- it's 4:40. Let's end  
16 now and we'll pick it up again tomorrow. And though it may or  
17 may not seem like it, the testimony is actually going forward  
18 as scheduled and everybody's plan is still that you will have  
19 this for your consideration this week. Enjoy the evening.  
20 Remember to keep an open mind. You haven't heard all the  
21 testimony. Thank you again for being here timely. I'll see  
22 you again at 9:30 in the morning.

23 (Jury excused)

24 (Continued on next page)

25 THE COURT: Make sure Ms. Blakely has the e-mails

C42FFRE4

Laopoulos - cross

1 where you want us to send the proposed charge. We'll have the  
2 charging conference tomorrow at the end of the testimony and  
3 we'll try to get that to you within, say, two hours.

4 All right, thank you.

5 MR. DREYER: Your Honor, one quick housekeeping  
6 issue --

7 MS. AGUIAR: Two. One for him, one for me.

8 MR. DREYER: One with respect to the fruit exhibits.  
9 Our fresh cut fruit exhibits are now past their expiration  
10 dates. We had marked both the demonstrative the actual bowl  
11 itself and took a photograph of that as well. What we propose  
12 doing if both parties might want to use those in summation is  
13 to discard the fresh, no longer good-looking fruit -- if the  
14 Court would like, we could keep the packaging and sticker it  
15 and we would add, for example, if 122 is a bowl of melon, we  
16 would have 122A which is a new bowl of melon and have the  
17 photograph as well. So the original bowl --

18 THE COURT: But they'll look identical, correct?  
19 They'll look identical? In other words, 122 and 122A will look  
20 identical except for the fruit in 122 will look a little sorry,  
21 is that correct? All right. Is there any objection to simply  
22 making 122 now a new identical bowl?

23 MR. GONZALEZ: So, your Honor, yes. If they want to  
24 add a new bowl --

25 THE COURT: Yes, there's an objection?

C42FFRE4

Laopoulos - cross

1 MR. GONZALEZ: Yes, there's an objection. I'm holding  
2 so you can see the fresh fruit. There's no reason why we  
3 should replace this exhibit. If they want to bring a new one  
4 in, they can. The fact that it doesn't look great is precisely  
5 our point. It doesn't last very long and that's why a lot of  
6 consumers don't buy it, so it's actually relevant that it maybe  
7 doesn't look great. There there's been testimony about the  
8 best by dates on them, so you can't get rid of them. There's  
9 no reason to throw the fruit away. If you want to throw the  
10 food away after the jury --

11 THE COURT: We're not talking about throwing the food  
12 away. We're talking about what exhibit is going to be before  
13 the jury so there's an objection to my suggestion. Go ahead,  
14 sir?

15 MR. DREYER: Your Honor, if this is some experiment to  
16 show what fruit is supposed to look like after two or three  
17 weeks, they could have done this. This stuff has been sitting  
18 out on counsel table all day for two or three days last week.  
19 It's not fair to say look at this terrible looking fruit. If  
20 they wanted to do that, they could have done it in the proffer.

21 MR. GONZALEZ: You can look at the fruit. It's not  
22 terrible looking fruit. If it makes my point, I'll open it up  
23 and eat a piece, which I would. Do you want me to hand it to  
24 you?

25 THE COURT: It will probably make the witness'

C42FFRE4

Laopoulos - cross

1 testimony go faster.

2 MR. GONZALEZ: It's not like it's disintegrating.

3 THE COURT: But you want to make the point to them,  
4 apparently, that their fruit doesn't look so good after a very  
5 short period of time.

6 MR. GONZALEZ: No, your Honor. My point is that the  
7 fruit looks okay. I was responding to what they were telling  
8 your Honor. If what they're telling your Honor is that the  
9 fruit has completely disintegrated, which it hasn't, then that  
10 would be relevant in my view. I don't like the idea of  
11 tampering with evidence at middle of a trial.

12 THE COURT: I understand that. Changing evidence.  
13 Are you going to make any argument to the jury about the state  
14 of this fruit?

15 MR. GONZALEZ: I don't expect to, your Honor, but if  
16 we substitute it --

17 THE COURT: I understand. I understand.

18 MR. GONZALEZ: I don't expect to.

19 THE COURT: All right. Fresh?

20 MR. DREYER: Your Honor --

21 THE COURT: He doesn't intend to make an argument on  
22 what the fruit looks like.

23 MR. DREYER: Well, he doesn't expect to.

24 THE COURT: Yes.

25 MR. GONZALEZ: Right.

C42FFRE4

Laopoulos - cross

1 MR. DREYER: But the issue is for summation we would  
2 like to use new fruit. Summation is probably going to be in  
3 two days on Wednesday morning. We have stuff expired on 3/31  
4 that even under normal conditions is probably not what we want  
5 to show people as representative of our product.

6 THE COURT: Sir, do you have any objection to their  
7 showing the jury, they'll show them 122 and show them a brand  
8 new exhibit that has, is also cantaloupe chunks and we'll give  
9 it another number.

10 MR. GONZALEZ: Your Honor, what I told them on the  
11 weekend, what I'll tell the Court now, if you want to bring in  
12 a fresh bowl a fresh fruit to make it 155A, I'm fine with that.

13 THE COURT: There's your answer. There's no objection  
14 to putting in a cantaloupe chunk as 555A, a cantaloupe chunk  
15 bowl that looks fresh on summation. All right?

16 MR. DREYER: And, your Honor, in terms of the fruit  
17 that's expired and now literally leaking, what should we do  
18 with that other than keep it in the refrigerator?

19 THE COURT: You can keep it in the refrigerator. The  
20 ruling is the same. You can show them, put in a new one, an A  
21 and show it to them. And if you want I will explain to the  
22 jury what's going on, that is it's beyond the expiration date  
23 so you're giving them fresh fruit, if you want me to.

24 MR. DREYER: We'll let the Court know if that's okay.

25 THE COURT: All right, fine. Anything else?

C42FFRE4

Laopoulos - cross

1 MS. AGUIAR: The second issue, your Honor, was  
2 something from several days ago. It was the prejudicial  
3 Exhibit 508 that we put up. It was about rights in Europe. We  
4 reserved our rights in our pretrial order --

5 MR. GONZALEZ: Withdrawn.

6 MS. AGUIAR: Fine. Done.

7 THE COURT: Anything else?

8 MR. DREYER: No.

9 THE COURT: See you everybody tomorrow at 9:30. Thank  
10 you.

11 (Adjourned to April 3, 2012 at 9:30 a.m.)  
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